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Regulating the Raters:
The Law and Economics of Ratings Firms

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Executive Summary

Consumers and producers frequently rely on product ratings, such as college rankings, restaurant reviews and bond ratings. While much has been written about the structure of ratings in particular industries, little has been written on the general structure of different ratings industries and whether government intervention is typically needed. This paper begins that inquiry by examining the market structure of different ratings industries, and considering the circumstances under which firms that provide ratings should be regulated. The issue is particularly timely in light of recent calls to rethink the regulation of media ratings and credit ratings.

We find that ratings firms in different industries share several common features. For example, most ratings firms operate in highly concentrated markets. Some factors that could make ratings markets more concentrated include economies of scale, benefits from having a single standard, and general agreement on what should be measured. We also find that most ratings firms determine their own testing standards and methods, although some industries have self-governing oversight bodies that offer their own accreditation standards. While the government regulates firm entry for a few ratings industries, this is relatively rare. The vast majority of ratings firms are unregulated.

We analyze the question of regulation using an economic framework that focuses on the viability and effectiveness of a proposed policy. Despite the finding that many ratings industries are concentrated, our analysis suggests that market forces generally appear to be an effective mechanism for providing consumers and producers with useful ratings. In most cases, such markets do not require government intervention. Moreover, in industries characterized by rapid technological change the government is likely to do more harm than good by intervening. As an alternative to government regulation, voluntary industry oversight bodies may be effective in improving communication between the parties and in improving transparency in rating procedures.

Regulating the Raters: The Law and Economics of Ratings Firms

Harold Furchtgott-Roth, Robert W. Hahn and Anne Layne-Farrar

I. INTRODUCTION

Consumers and producers frequently use product ratings. Examples include restaurant reviews, college ratings, and bond ratings. Scholars have studied many aspects of ratings, notably how asymmetries in information affect the pricing of products.[1] While much has been written about the structure of ratings in particular industries,[2] little has been written on the regulation and oversight of private sector ratings firms across industries.[3] This paper seeks to fill that void. Specifically, we examine the market structure of different kinds of non-governmental ratings industries and consider whether firms that provide ratings should be regulated.

The issue is particularly timely in light of recent calls to rethink regulation of media ratings and credit ratings. In both cases, Congress has considered changes that could involve a more direct role for the government or an outside body in regulating some ratings firms.[4]

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[1] *See e.g,*. S.J. Grossman, *The Informational Role of Warranties and Private Disclosure about Product Quality*, 24 J.L. & ECON. 461, 461-483 (1981); A.R. Adamati & P. Pfleiderer, *A Monopolistic Market for Information*. 39 J. ECON. THEORY, 400, 400-438 (1986); G. Biglaiser, *Middlemen as Experts*, 24 RAND J. ECON. 212, 212-223 (1993); C. Avery, P. Resnick, & R. Zeckhauser, 89(3) *The Market for Evaluations*, AM. ECON. REV. 564, 564 -584 (1999).

[2] The literature on individual ratings industries, especially for financial markets, is vast. For just one example, *see* Richard West, *Bond Ratings, Bond Yields and Financial Regulation: Some Findings*, 16 J. L. & ECON. 159, 159-168 (1973).

[3] Some papers discuss regulation, but most often it is regulation for the producers of the products or services being rated, not regulation of the raters themselves. *See, e.g.*, Hans K. Hvide & Aviad Heifetz, *Free Entry Equilibrium in a Market for Certifiers* (May 25, 2001). Other papers touch on market structure for ratings firms or mention regulation of such firms in passing, but there is typically little more than an acknowledgement of the subject. *See, e.g.*, Alessandro Lizzeri, *Information Revelation and Certification Intermediaries*, 30 RAND J. ECON. 214, 214-231 (1999); Gian Luigi Albano & Alessandro Lizzeri, *Strategic Certification and Provision of Quality*, 42 INT'L ECON.REV. 267, 267-283 (2001).

[4] A bill, titled Fairness, Accuracy, Inclusivity, and Responsiveness in Ratings Act of 2005, recently introduced in the Senate would mandate third-party review of media ratings methods. *See* S. 1372. 109th Cong. (July 1, 2005), *available at* http://thomas.loc.gov/cgi-bin/query/z?c109:S.+1372 (last visited Nov. 29, 2005). Congress is also considering new regulation involving credit ratings agencies, namely The Credit Rating Agency Duopoly Relief Act of 2005. *See* H.R. 2990. 109 Cong. (June 20, 2005), *available* at http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.2990.IH (last visited Nov. 29, 2005).

Despite important differences in the structure of these two industries, the approach to ratings in both areas shares some common features that could affect the usefulness of regulation. We analyze the appropriate role for government in regulating ratings industries by applying an economic framework that focuses on the viability and efficiency of a proposed policy.

Three key questions need to be addressed before considering regulation or oversight of any particular industry. First, a critical question is whether there is a significant market failure. That is, are there fundamental problems with the way the market operates that lead to an undesirable economic outcome? Such problems could arise as a result of market power, limited access to information, or externalities.[5] Second, a practical question is whether a viable plan exists for addressing the failure. The question of viability might seem obvious; however, in a surprising number of situations, policymakers fail to ask whether the proposed policy intervention is workable, or whether it is designed to achieve the desired outcome.[6] Third, a key economic question is whether the benefits from a regulatory policy are likely to outweigh the costs in economic terms. That is, are consumers and producers likely to be better off as a result of the plan? Answering these three questions is not always straightforward because of problems with defining markets and estimating benefits and costs. The answers often depend on the details of how an industry operates and the particulars of the alleged market failures, as we illustrate with our examples.

We find that different ratings industries share some common features. For example, most ratings firms operate in highly concentrated markets. At the same time, for those industries we examine in detail, we do not find evidence of substantial market power. Our analysis of different ratings firms suggests that market forces generally provide consumers and

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[5] For a seminal treatment of market failure, *see* Francis M. Bator *The Anatomy of Market Failure*. 72 Q. J. ECON. 351, 351-379 (1958).

[6] Consider, for example, illicit drug laws in the United States. While policymakers and reformers agree that the illegal drug trade in the U.S. needs to be controlled, drug laws have largely failed due to the lack of any viable regulatory solutions. The war on drugs is steadily weakening for many reasons, some of which include the inability to police covert dealings on private property and the lucrative incentives that overpower risks of incarceration (and enable bribes). In response to the failure in drug regulation, Kurt L. Schmoke**,** former Mayor of the City of Baltimore has observed, "It has been said that in public policy development we must distinguish between ideas that sound good and good ideas that are sound." *See* Kurt L. Schmoke, (reviewing J. JIM GRAY, WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT (2001)), *available* at http://www.judgejimgray.com/ (last visited Sept. 28, 2005).

producers with useful ratings. In most cases, such markets do not require government intervention. Indeed, very little government regulation is seen across the majority of ratings firms we consider. Market forces work to ensure that the benefits of the rating service are worth the expense; moreover, market forces are capable of keeping pace with technological shifts. In contrast, the benefits of government regulation are likely to fall short of the costs in many instances, and the government is not particularly adept at keeping up with industries characterized by rapid technological change.

We begin by considering two case studies that have caught the attention of policy makers. In particular, Section II evaluates the need for regulating media ratings firms and Section III examines the need for regulating the credit ratings industry.[7] The detailed analysis highlights two factors relevant in a review of the possible benefits of regulation—namely the presence of a significant market failure and the ability of government to correct for that failure in a cost effective way. In Section IV, we then examine other industries in which ratings firms play a role. This review enables us to identify some key features that affect the structure of different ratings industries, and also allows us to assess conditions where regulation, or some other policy intervention, might improve industry performance. Section V summarizes our main conclusions and identifies areas for future research.

II. REGULATING MEDIA RATINGS: AN ECONOMIC PERSPECTIVE

Media ratings have received quite a bit of press over the last few years. At the center of the controversy is Nielsen Media Research, the primary company providing ratings for television shows in the United States. The controversy initially began in 2002 when Nielsen announced it was switching from a paper-based method to an electronic technology for measuring demographics in local television ratings for Boston, but came to a fevered pitch in 2004 as other large cities were added to the list.[8]

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[7] We use the term "ratings industry" to indicate the group of firms that provide ratings of a particular type. While not an "industry" in the usual sense of the word, this phrase allows us to distinguish the market structure of the ratings firms as separate from the products and services they rate.

[8] The old paper diary method of capturing who was watching programs in local markets would be gradually replaced by an electronic method called the People Meter in major markets. See discussion *infra* Section II.A.1. Kevin Downey, *Boston stink bomb over people meter*, MEDIA LIFE, Feb. 7, 2002, *available at*

Several powerful industries have a keen interest in television ratings because ratings can have a dramatic impact on a firm's bottom line. Ratings are the "currency" used for advertising-supported television—they form the basis for negotiating the price of advertising time.[9] Advertising provides practically all revenue for broadcast television and is a large and increasing revenue source for cable television.[10] Advertising companies and the agencies that create their ads use ratings to focus advertising campaigns on target audiences with different demographic characteristics, such as women between the ages of 18 and 34. Broadcasters and cable companies use these ratings to decide which shows stay on the air, which new shows are developed, and which audiences they wish to target.[11] Ratings are also used by policymakers in defining markets for antitrust and regulatory purposes, and in helping to define such concepts as the hours covered by broadcasting indecency rules.[12]

Because media ratings affect the profitability of many different companies, it is not surprising that a proposed change in ratings measurement technology was controversial. Critics of Nielsen's change in measurement techniques initially claimed that the sampling method used

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http://www.medialifemagazine.com/news2002/feb02/feb04/4_thurs/news2thursday.html; Nielsen Media Research, *Nielsen Releases Local Demographic Ratings for Summer Cable Shows, News Release*, Aug. 4, 2005, *available at* http://www.nielsenmedia.com/newsreleases/2005/cable_demo_release_july05.doc.

[9] Such ratings have also been used by public television, which are included in all ratings measures. For instance, a PBS affiliate has used ratings data to test the effectiveness of its telethons. *See* KCTS Public Network, *Viewer FAQ*, (2005), *at* http://www.kcts.org/inside/contact/faq/ (last visited Sept. 28, 2005).

[10] *See* Molly Peterson, *Cable Industry Warned: High Rates May Draw Regulation*. CongressDaily. Mar. 25, 2004 at Technology Daily PM; David Haffenreffer & Deborah Marchini, *Advertising & The Economy*. CNN: MONEY MORNING, May 14, 2002. See also Meredith Corporation's fiscal year 2005 unaudited financial statement, where it reports that 97.89% of total broadcasting revenue came from non-political and political advertising. Meredith Corporation, SEC 10-K Report, (Sept. 12, 2005) at 23, *available at* http://yahoo.brand.edgar-online.com/doctrans/finSys_main.asp?formfilename=0000065011-05-000130&nad (last visited Sept. 28, 2005). According to Viacom, owner of CBS, the majority of TV network revenues are generated from advertising sales and television licensing sales. *See Viacom*, SEC *10-K* Report, (Mar. 16, 2005) at II-3, *available at* http://www.viacom.com/pdf/form10KMar2005.pdf (last visited Sept. 28, 2005).

[11] Frequently, shows are taken off the air that do not enjoy good ratings, even though they appeal to certain audiences. As Nielsen explains on its website, "The irony of the mass medium of television is that a program with 'only' a few million viewers may be an unpopular program. It may take ten million viewers for a network or nationally syndicated program to be popular enough to be a business success." *See* Nielsen Media Research, *Frequently Asked Questions*, *at* http://www.nielsenmedia.com/FAQ/ratings.html (last visited Sept. 28, 2005). For more on how networks employ ratings, *see* Ronald Goettler, Advertising Rates, Audience Composition, and Competition in the Network Television Industry (1999) (Working Paper #199-E28 in Carnegie Mellon University Graduate School of Industrial Administration).

with the new technology discriminated against minorities, undercounting African American and Hispanic viewers.[13] It was alleged that this undercounting reduced minority programming and minority employment in the media industry.[14] The basis for that charge, however, has been hotly disputed.[15] In fact, several minority-oriented networks, including Black Entertainment Television and the Spanish language broadcaster Univision, came out in support of local People Meters, the electronic technology slated for use in major market local ratings measurement.[16] The racial bias claims have since faded.[17]

The other line of complaints has targeted Nielsen's dominant position in the industry. As such, critics suggest that the company is unresponsive to its clients and is trying to push poorly developed technology and faulty sampling methods.[18] Such criticisms are not unique to media ratings: local cable and phone service companies have received similar accusations.[19] If

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[12] *See* James G. Webster, *The Role of Audience Ratings in Communications Policy*, 59 FED. COMM. & L. 263 (1991). *See also*, David M. Hunsaker, *Duopoly Wars: Analysis and Case Studies of the FCC's Radio Contour Overlap Rules*, 2 COMMLAW CONSPECTUS, 21, 21-42 (1994).

[13] The most vociferous critic has been Rupert Murdoch and News Corporation. *See* Raymond Hernandez & Stuart Elliott, *The Odd Couple vs. Nielsen*, N.Y. TIMES, June 14, 2004.

[14] In particular, critics claimed that people meter "fault rates"—the percentage of the sample containing unusable data, frequently due to equipment problems—were higher for African Americans and Hispanics than for other groups because of racial bias in the implementation of the system. Meg James, *Nielsen Meters Dealt a Setback; A TV trade group declines to endorse the rollout in New York of the viewership gauge*, LA TIMES. May 28, 2004, at C3. Hearings, sponsored by Montana Senator Conrad Burns, were held in the summer of 2004 to investigate these charges.

[15] Nielsen presented statistical explanations for the higher fault rates. Susan D. Whiting, Reply to questions from Senator Conrad Burns (Oct. 20, 2004).

[16] James, *supra* note 14. Betsy Streisand. *The tracker behind the tube*. U.S. NEWS & WORLD REP. Aug. 11, 2004. David Poltrack, vice president of research at CBS, admitted in April 2004: "We think Nielsen's minority sampling in New York [a key area of contention] is actually very good." Brooks Barnes, *News Corp. Opposes New Local-TV Rating System*. WALL ST. J., April 5, 2004, at B3.

[17] *See*, for instance, *How Nielsen Stood Up to Murdoch: Fox played the race card to upend a new TV ratings system. It didn't work*," BUS. WEEK., Sept. 20, 2004.

[18] *See*, e.g., the comments of Pat Mullen, CEO of Tribune Company's Tribune Broadcasting, as quoted in a National Post article: "[the people meter] continues to be embarrassingly defective… And because Nielsen is a monopoly, we have nowhere else to turn." Neil Roland, *Minorities back Nielsen's attack on ratings bill*," NAT'L. POST, July 28, 2005.

[19] *See* Thomas W. Hazlett, *Cable TV Reregulation: The Episodes You Didn't See on C-SPAN*, 16 CATO REGULATION (1993), *available at* http://www.cato.org/pubs/regulation/reg16n2d.html (last visited Sept. 28, 2005); *See also*, Karen Jacobs, *Technology Journal: Not at Your Service — Competition Was Supposed to Make Telecom Companies in the U.S. More Attentive to the Customer; What Happened?*, ASIAN WALL ST. J., Sept. 25, 2000, at T6.

the claims regarding television ratings are true, it would be reasonable to consider regulating Nielsen in some fashion to curb its abuse of market power.

The most specific regulatory proposal to emerge from the debate over television ratings is a bill introduced in the Senate in 2005 that would require media ratings companies to obtain accreditation from an internal industry oversight council before any new ratings service could be sold.[20] While the specific Senate proposal may not become law, it serves to frame the analysis of whether it is desirable to regulate media ratings companies.

None of the debate surrounding the use of electronic People Meters for local television ratings has directly addressed the three regulatory questions we raised in the introduction. Those calling for media ratings regulation usually focus on market structure, rather than market failure. Critics assert that Nielsen is a monopoly. They claim it makes unilateral decisions without the checks and balances of competition; decisions that are ill thought out and will hurt the media industry as a whole.[21] Once the specter of monopoly is invoked, regulation emerges as a natural candidate for limiting the power of the firm. The government's track record in restoring balance in monopolistic markets is debatable, of course, which may be why proposals thus far have called for an internal industry group to oversee and sanction media ratings measurement.[22]

The third question, on costs and benefits of regulation, has been largely ignored in the media ratings debate. But without a sense of whether the benefits are likely to outweigh the costs, a decision to regulate could be counterproductive.

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[20] Senate hearings were held to discuss this proposal on July 27, 2005. The bill, supported by News Corp. and introduced by Senator Conrad Burns, is titled the Fairness, Accuracy, Inclusivity, and Responsiveness in Ratings Act of 2005. *See* Tory Newmyer, *Regulatory Bill Would Benefit News Corp*., ROLL CALL, July 13, 2005. The council charged with mandatory oversight is the very council that was itself created in the aftermath of House hearings regarding media ratings held in the mid 1960s. Fairness, Accuracy, Inclusivity, and Responsiveness in Ratings Act of 2005, S. 1372. 109th Cong. (July 1, 2005), *available at* http://thomas.loc.gov/cgi-bin/query/z?c109:S.+1372 (last visited Nov. 29, 2005).

[21] Stuart Elliot, *Remember how upset Univision was over Nielsen's people meters? Now, both sides have dropped legal actions and will seek a deal on counting viewers*, N.Y. TIMES, Nov. 30, 2004, at 14.

[22] *See e.g.*, Robert W. Crandall & Clifford Winston, *Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence*, 17 J. OF ECON. PERSP. 3, 3-26 (2003); Jonathan B. Baker, *The Case for Antitrust Enforcement*, 17 J. OF ECON. PERSP 27, 27-50 (2003).

A. The Market Failure Issue

Before we can answer the question of whether there is a market failure, we need a working knowledge of the technology and the market. We begin by providing an overview of how media rating methods have evolved over time. We then consider market structure and end the section by weighing the evidence on whether a significant market failure really exists.

1. How Ratings Are Measured

The earliest attempts at media ratings relied on telephone interviews. Starting in 1929, Archibald Crossley, on behalf of the Association of National Advertisers, randomly selected people to interview by phone.[23] The method relied strictly on recall, what people could remember about listening to radio programs and sponsors the day before the call was made. In 1935, C.E. Hooper modified that method by surveying people as they listened to the radio, the so-called "telephone coincidental" method.[24] This eliminated the faulty memory problems associated with recall methods. On the other hand, this method was limited to rating shows airing during reasonable calling hours. Late night and early morning programs received no ratings at all.

In 1936 A.C. Nielsen introduced the first electronic measurement device. The company entered the radio ratings industry with an "audiometer," a box hooked directly to a radio that measured minute-by-minute when a radio was on and the channel that was broadcasting.[25] The company recruited people in advance to participate in the ratings process. The audiometer method had a number of obvious advantages over previous methods. In particular, the ratings were based on actual behavior as opposed to potentially flawed recollections. The meters also provided much more data. They could measure when the radio was on at any time. The small

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[23] *See* American Social History Project/Center for Media & Learning, City U. of N.Y., & the Center for History and New Media, GMU, History Matters: The Rating Game: Broadcasters Rely on Poll Numbers They Don't Trust, *at* http://historymatters.gmu.edu/d/6266.html (last visited Sept. 28, 2005).

[24] *Id*. Telephone coincidentals are still used today to test the accuracy of other data collection methods. *See* Nielsen Media Research, *What TV Ratings Really Mean*, *at* http://www.nielsenmedia.com/whatratingsmean/ (last visited Sept. 28, 2005).

[25] *See* Nielsen Media Research, *Company History*, *at* http://www.nielsenmedia.com/history.html (last visited Sept. 28, 2005).

time increments captured changes in stations, which is especially important for determining whether people switch when a station break or commercial airs.

Electronic meters do have weaknesses though. First, installing meters was far more expensive than making a few phone calls. Unlike telephone interviews, the equipment could fail, plus the passive meter could only detect when the set was on, not how many people were listening to it. People were sometimes reluctant to accept a black box in their homes. For those that did participate, it was unclear whether the presence of the audiometer altered typical listening behavior.[26] In general, the advantages of electronic measurement were (and are still) viewed as outweighing the disadvantages.[27] Thus, when television began to eclipse radio in the 1950s, Nielsen adapted the audiometer to the new medium.

Despite its usefulness, electronic measurement has generally been supplemented by simpler (and cheaper) measurement techniques. Because of the expense of attaching electronic meters to numerous television sets in multiple states, and the need to provide both local and national ratings, Nielsen implemented paper diaries as a supplement to meters. As with electronic meters, people have to be recruited in advance to participate in television or radio ratings that use diaries.[28] Those agreeing to participate receive a special journal and are asked to record all of the programs they see or hear over a seven-day period, all in 15-minute increments. Because it costs little to implement, large samples are relatively easy to compile with this method. Diaries can therefore be effective in reaching a broad cross-section of households. Respondents need not even have a telephone. Diaries can also enable media rating companies to ask for extra information, such as the number and ages of the people in the audience, their attentiveness to commercials, and the like.

The diary method, like all of the methods discussed so far, has its shortcomings as well. Filling out a diary can be tedious and time-consuming, so many people refuse to participate. High non-participation rates can lead to a biased sample, where those responding are inherently

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[26] This last issue is referred to as the Hawthorne Effect: knowing they are being "watched," people act differently. *See* F. ROETHLISBERGER & W. DICKINSON, MANAGEMENT & THE WORKER: AN ACCOUNT OF A RESEARCH PROGRAM CONDUCTED BY THE WESTERN ELECTRIC COMPANY, CHICAGO (1939).

[27] *See* American Social History Project/Center for Media & Learning, City U. of N.Y., & the Center for History and New Media, GMU, *supra* note 23.

[28] *Id.*

different from those not responding. When bias is acute, it can call into question the validity of the resulting ratings.[29] Some people also tend to wait until the last moment to fill out their diaries, meaning the problems with recall are at play here just as with the telephone interviews of the 1930s.[30] Faulty recall can result in diary keepers over-reporting more familiar or more frequently viewed channels. Thus, more frequently viewed channels may get higher ratings than they deserve for particular shows, while special interest cable channels may get lower ratings than they deserve.[31] A final problem is that many diaries are unusable—some never get mailed in or are filled out incorrectly.[32]

The combination of paper diaries with electronic meters has been the standard approach for national ratings measurement for several decades, although meter technology has continued to evolve and sampling procedures have changed over time. Nielsen's electronic People Meter became the standard for collecting national television ratings data in the late 1980s. The People Meter is a box about the size of a paperback book and is placed on or near each television set in the 5,000 to 10,000 households that typically comprise the national sample.[33] The box automatically records the channel directly from television shows and commercials to identify what is playing. In order to link that information to who is watching, the People Meter includes a remote control device. Each member of a household is assigned a button, which they push when they begin watching and again when they are done watching. Collecting data in this manner can lead to another potential problem, though—"button pushing fatigue."[34] Some

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[29] Non-response bias is an issue for all survey methods, including telephone surveys and People Meters. The more effort a survey requires from a participant, the more likely non-response bias is an issue.

[30] *See* American Social History Project/Center for Media & Learning, City U. of N.Y., & the Center for History and New Media, GMU, *supra* note 23. *See also*, Museum of Broadcast Communications, *Ratings*, *at* http://www.museum.tv/archives/etv/R/htmlR/ratings/ratings.htm (last visited Sept. 28, 2005).

[31] *See* Erwin Ephron, *The Arbitron PPM Versus the Nielsen Meter/Diary*, Oct. 2003, *at* http://www.ephrononmedia.com/article_archive/articleViewerPublic.asp?articleID=107 (last visited Sept. 28, 2005).

[32] One source notes that as many as 50% are generally discarded due to unusable data. *See* Museum of Broadcast Communications, *Ratings*, *at* http://www.museum.tv/archives/etv/R/htmlR/ratings/ratings.htm (last visited Sept. 28, 2005).

[33] *See* Nielsen Media Research, *supra* note 23. Participants remain in the sample for approximately 2 years, but at any given point there are new households added as others drop out.

[34] *See* The Museum of Broadcast Communications, *supra* note 32.

industry observers have speculated that panel members might tire of recording their presence and either skip button pushing or lower their television viewing altogether.[35]

Getting accurate media ratings is a challenge regardless of the technology employed. Even with a combination of paper and electronic measurement techniques, obtaining a full census of the entire nation's media consumption is generally not feasible. Instead, a sample of the full population must be taken. Measuring the audience accurately and getting a representative sample requires considerable effort for all of the companies working in this field.

Sampling is a complicated statistical issue. The main issue of importance for this debate is population coverage. Media ratings companies spend substantial resources trying to make their samples as representative as possible, taking into account such factors as family size, sex and age of household head, income, and education. As the number of cable and satellite channels continues to grow, and as advertising companies continue to target their products to narrower groups, the costs of getting a representative sample can be expected to increase.[36] Sample size typically needs to increase to allow for data analysis at a more detailed level, so that valid statements can be made about the viewing habits of different groups, such as Hispanic young women or Asian teenagers.[37] The companies conducting media measurements have continued to improve the technologies employed over time, but perfection is not attainable at a reasonable cost. A rating firm therefore must strike a balance between sample size, reliability and the cost of obtaining the data.[38]

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[35] *Id.*

[36] *See* John Dimling, *Measuring Future Electronic Media Audiences*, 25, RC-4, J. ADVERTISING RES. (1985).

[37] The latter approach is referred to as "over-sampling" S*ee e.g.* National Center for Health Statistics, *available at* http://www.cdc.gov/nchs/datawh/nchsdefs/oversample.htm (page last reviewed Dec. 16, 2004).

[38] For example, most presidential polls have relatively small samples, contacting 1,000 to 1,500 registered voters. The typical sampling error for these studies is around +/- 4%. Most consumer products market research, on the other hand, are considerably larger and therefore attain higher accuracy levels. For example, a poll conducted by the National Retail Foundation had a sample size of almost 7,000 with a sampling error of +/- 1%. For presidential polls, *see Kerry holds edge over Bush following first debate*. USA TODAY. (May 20, 2005), *available at* http://www.usatoday.com/news/politicselections/nation/polls/2004-09-30-debate-poll.htm (last visited Sept. 28, 2005); *Washington Wrap*, CBS NEWS, (Feb. 11, 2004), *available at* http://www.cbsnews.com/stories/2004/02/12/politics/main599897.shtml (last visited Sept. 28, 2005). For retail poll, *see* National Retail Foundation. *Back to School Spending to Slide Eight Percent as Demand for Computers Cools.* (July 19, 2005), *at* http://www.nrf.com/content/default.asp?folder=press/release2005&file=bts0705.htm&bhcp=1_ (last visited Sept. 28, 2005)

New technology can address some of the problems with sampling, but is likely to replace those problems with others. For instance, it will soon be technically feasible to collect detailed data on programs that are watched using cable boxes and satellite hook-ups.[39] This kind of measurement is both pervasive and passive, meaning that sampling bias and participant fatigue would be of less concern.[40] These methods do have drawbacks though, some of which are familiar. Like the radio audiometers of the past, cable and satellite techniques would be capable of recording in minute detail the station that is on, but would not be able to record exactly who is watching. The TV playing in the background with no one in the room, a family show viewed by all members of a household, and a Super Bowl party for 20 would each be recorded the same way. Thus the data collected could not be segmented according to advertisers' target groups. Just collecting overall household data poses problems because linking what is watched to the delivery of the program, without any explicit consent on the part of viewers, raises some thorny privacy issues. If privacy is protected, on the other hand, it either means compromising on audience reach—bringing us back to sampling problems—or compromising on the information about who is watching—say by aggregating the data.[41]

Given the concerns over the level of effort required from individual participants in television ratings, another branch of ratings measurement research has focused on increasing participation rates through more passive methods of tracking viewership. One such effort is the portable people meter (PPM) being developed and tested by Arbitron.[42] The PPM is a small device that individuals would carry each day, much as they do a cell phone or a pager. The device collects identifying signals encoded in each television show and radio program the individual watches, listens to, or is otherwise exposed to due to proximity to a television or radio signal—whether in the home or out. The PPM is not entirely passive—individuals must

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[39] *See* Bill Harvey, *Better Television Audience Measurement Through Cable and Satellite Set Top Boxes*, *at* http://www.billharveyconsulting.com/articles/pdf/BetterTelevisionAudienceMeasurement.pdf (last visited Sept. 28, 2005). *See also*, Jon Gertner, *Our Ratings, Ourselves: The Mismeasurement of TV*, N.Y. TIMES, Apr. 10, 2005, *available at* http://medialit.med.sc.edu/our_ratings_ourselves.htm (last visited Sept. 28, 2005).

[40] Sample bias would still need to be monitored, since not every household has cable or satellite.

[41] For households with DVR services, such as TiVo or Replay TV, satellite and cable measures could overstate viewership since not all programs recorded by the system will necessarily be watched.

[42] Arbitron, *Portable People Meter*, *at* http://www.arbitron.com/portable_people_meters/home.htm (last visited Oct. 27, 2005).

clip it on each day and put it in a docking station each night for the data to be uploaded to the rating firm—but the level of effort required by panelists is lower than that required for other collection methods. In the future, the devices might even be programmed to capture print media reading habits and the retail stores visited by participants.[43] Eventually, all media viewing, ad exposure, and purchasing behavior could be studied together using one data source.

This last point—the ability to link media exposure, ad exposure, and purchasing behavior—gets to the heart of media ratings. In the past, advertisers and their agencies were satisfied with program ratings. Chances were if someone watched a show he at least heard the commercials, justifying an advertiser's expenditures on airtime. As a result, a program's demographics were thought to cover the demographics for commercial viewership as well. Today, advertisers place far less faith in that kind of spillover.[44] Technologies like the DVR services TiVo and Replay TV enable viewers to "time shift" their viewing, and thus to fast forward through programs and skip ads altogether.[45] The Yankee Group, a communications research firm, predicts that the number of homes with DVR will increase nearly 5-fold in the next few years, from 7 million in 2004 to 33.5 million by 2008.[46] In this environment, advertisers can no longer infer ad exposure from program measurements, although perhaps they never could.[47] While time shifting technologies are relatively new, they revive an old interest in a difficult issue: how to best measure the effectiveness of advertising.[48]

Even if an ideal method for measuring ratings and ad exposure were developed, a serious question would remain as to how those ratings were actually used. As one industry observer notes, "the weakest link in the system, at present, seems to be how the ratings are used. Networks tout rating superiorities that show 0.1 percent differences, differences that

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[43] Arbitron, Informational Webcast titled *Audience Measurement In A Portable People Meter World*, July 11, 2003.

[44] Jane Black, *Coming Soon: A Horror Show for TV Ads*, BUS. WEEK, June 27, 2003.

[45] Lyra Research, *Survey Finds DVR Users Tuning into Live TV Programs Late to Skip Ads and Save Time*, May 27, 2004, *available at* http://www.lyra.com/PressRoom.nsf/0/19e95b719e3e964a85256ea6004c5d8c?OpenDocument.

[46] *See* Ann Oldenburg, *TiVo's ripple effect: Water-cooler chill*, USA TODAY, Mar. 23, 2005, *available at* http://www.usatoday.com/life/television/news/2005-03-23-tivo-office-chat_x.htm.

[47] Even as early as 1971, movies such as Disney's *The Barefoot Executive* were making jokes about television viewers getting up for a drink during commercial breaks. THE BAREFOOT EXECUTIVE (Disney 1971).

certainly are not statistically significant."[49] This problem underscores the tension between two key ratings users: broadcasters and advertisers. Media providers may need accurate data for program planning, but their primary concern is maximizing the price of ad time. Advertisers, on the other hand, want to select the most effective media vehicle for the message at hand, and limit their costs.

In addition to misusing the statistics, for methods with a predetermined collection time, like paper diaries, the statistics themselves can be manipulated. Most people have heard of television "sweeps" periods—the weeks designated for measuring television ratings where diary keepers record and report their viewing—because broadcasters hype them so much in advance.[50] The networks and cable companies offer special programming during the weeks that ratings panelists are filling out their diaries. As a consequence, those ratings are not representative of typical viewing habits in non-sweeps months.

This review of ratings methodology reveals that all of the ratings methods have their strengths and weaknesses. More to the point for our analysis, different methods can result in different ratings. The claims of abuse of market power raised in the controversy over the move to local People Meters become easier to understand in this context. If, as mentioned above, paper diaries tend to inflate the ratings for popular programs and networks, we might expect the heads of those programs and networks to resist changes that replace the diaries with other technologies.[51]

The overview of ratings methods also hints at a feature of the industry that is important for assessing whether regulation might be needed: what services compete in the relevant market and how is that market structured? We next turn to these questions.

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[48] Stefanie Olsen, *Advertisers face up to TiVo reality*, CNET News, Apr. 26, 2004.

[49] *See* The Museum of Broadcasting Communications, *supra* note 32.

[50] Jon Gertner, *Our Ratings, Ourselves: The Mismeasurement of TV*, N.Y. TIMES, (Apr. 10, 2005), *available at* http://medialit.med.sc.edu/our_ratings_ourselves.htm (last visited Sept. 28, 2005).

[51] *See* the discussion *infra* section II. Note that proponents of the portable people meter recognize that switching to the new technology will involve an equally painful transition. *See* P.A. Pellegrini, *Listen without Prejudice*, VUE (June 2005). ("The transition from diary to meter measurements for TV audiences led to differences in results between the two methods …which required a period of adjustment through the disruption in the trading relationships of buying and selling airtime. Nevertheless, there remained little doubt that electronic

2. The Market for Television Ratings

Nielsen is, at present, the sole provider of television ratings in the United States. In many instances, however, a monopoly does not necessarily translate into meaningful market power.[52] To better understand the structure of the market and the extent of any market power, we need to consider three key issues: barriers to entry, potential market entrants, and product substitutes.[53] For potential entry, we ask whether other firms could provide television ratings if it were profitable to do so. In particular, we explore whether radio ratings companies, other media ratings firms, or even marketing research firms could provide television ratings. If so, these "supply-side" pressures could attenuate any power Nielsen might have from its monopoly in television ratings. Moreover, such firms may be able to enter the market quickly if there are relatively low barriers to entry. For product, or "demand-side," substitution, we explore the options that broadcasters and advertisers have in lieu of using Nielsen's television ratings. As with supply side pressure, product substitutes tend to weaken a monopolist's ability to take unilateral actions. We find that even if Nielsen currently has a monopoly in the provision of television ratings, its continued dominance is not assured and there appear to be limits on its ability to exercise market power.

a. Competition in U.S. Media Ratings Over Time

As already noted, the history of television and radio ratings is intertwined. Media ratings began with radio in the early 1930s, but most of the radio ratings firms added television

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measurement panels were superior to diary methods. …The next transition for TV, from button-pushing meters to passive measurement using PPM, has also required some adjustment." p. 2-3).

[52] A trivial example would be the Wendy's "monopoly" of the Frosty. A monopoly in a narrow sense might exist, but there could be close substitutes (chocolate shakes from McDonalds, milkshakes from Baskin Robbins). As the example illustrates, the definition of monopoly and the determination of market power hinge on the definition of the "market." Defining a market in economic terms requires empirical analysis and data of this sort is unavailable for media ratings. Regardless of the technical market definition, however, another constraint on "monopoly" power is competition *for* a market rather than *in* a market, such as many authors have noted exists for network products like computers and software. For a discussion of competition for the market, *see* David S. Evans & Richard Schmalensee, *Some Economic Aspects of Antitrust Analysis in Dynamically Competitive Industries*, in INNOVATION POLICY AND THE ECONOMY, VOL 2 (Adam B. Jaffe, Josh Lerner & Scott Stern ed., MIT Press 2002).

[53] MICHAEL L. KATZ & HARVEY S. ROSEN. MICROECONOMICS 329-331 (Irwin McGraw-Hill 3d ed. 1998).

ratings to their offerings when that technology came along.[54] In fact, Arbitron, one of the early media raters, provided television ratings in direct competition with Nielsen Media Research until 1993.[55] The barriers to entry involved in moving between radio and television ratings measurement do not appear to be significant.[56] Many of the fundamentals of measuring an audience, be it for television or radio, are the same. Indeed, as noted earlier, audience measurement technology research is currently focused on developing a portable people meter that would capture consumption for *both* television and radio programs.[57] The history of media ratings suggests that the barriers to entry for television ratings are not substantial for companies operating in the broader media ratings market, although that market may not be able to support multiple raters, or end users may prefer a single supplier—points we explore in more detail below. Nonetheless, a ready group of potential competitors to Nielsen appears to exist.[58]

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[54] C.E. Hooper and Arbitron, which began offering a radio ratings service in 1949, both provided television ratings. Arbitron provided TV ratings until 1993, but Hooper sold out to Nielsen shortly after television became popular. *See* American Social History Project/Center for Media & Learning, City U. of N.Y., & the Center for History and New Media, GMU, *supra* note 23; The Museum of Broadcasting Communications, *supra* note 30; Richard M. Rockwood, *Arbitron Research Report*. (Feb. 2002), *available at* http://www.focusinvestor.com/ArbitronResearchReport.pdf (last visited Sept. 28, 2005).

[55] Arbitron entered the media ratings industry in 1949 with a TV ratings service. It expanded to radio ratings in 1965, where it remained until 1993, when it stopped providing television ratings and focused its efforts on radio. *See* Richard M. Rockwood, *Arbitron Research Report*. (Feb. 2002), *available at* http://www.focusinvestor.com/ArbitronResearchReport.pdf (last visited Sept. 28, 2005). According to the company, Arbitron exited television ratings "because measuring audience sizes for local TV stations isn't profitable." Josef Adalian, *Inside Boston TV Arbitron's bow worth big bucks to Channel 25*. BOSTON HERALD, Dec. 13, 1993. The publicly given reason suggests either that the television market may not be large enough to support more than one ratings provider or that ratings users prefer a single source.

[56] Certainly, radio listening and television viewing are different along several dimensions. For instance, a good deal of radio consumption today (around 46%) occurs in automobiles or on portable devices, not in homes. (Radio Advertising Bureau. *Radio Marketing Guide & Fact Book for Advertisers*, 12 (2003-2004), *available at* http://www.rab.com/station/marketing_guide/RMGFB2004.pdf (last visited Sept. 28, 2005).) For television, out-of-home viewing is only 10-20%. (Gertner, *supra* note 50.) Less is known about out-of-home television viewing, however. According to one industry observer, "We're beginning to learn that out-of-home television viewing is more than just men in bars, watching sporting events in the evening." *See* Arbitron, *The Portable People Meter*, *at* http://www.arbitron.com/portable_people_meters/home.htm (last visited Nov. 14, 2005).

[57] For more on the development of this technology, *see* Arbitron, *The Portable People Meter*, *at* http://www.arbitron.com/portable_people_meters/home.htm (last visited Sept. 28, 2005).

[58] According to the Census Bureau, more than 100 establishments compete in overall media ratings. U.S. Census Bureau, *2002 Economic Census, Professional, Scientific, and Technical Services*, 1, 17 (Oct. 2004), *available at* http://www.census.gov/prod/ec02/ec0254i09.pdf. Companies include Arbitron, BPA WorldWide, and MediaMark, in addition to Nielsen Media Research. Arbitron, *About Arbitron*, *at* http://www.arbitron.com/about/home.htm (last visited Sept. 28, 2005); BPA Worldwide, *at* http://www.bpaww.com/ (last visited Sept. 28, 2005); Mediamark Research Inc., *at* http://www.mediamark.com/

Arbitron is an especially attractive candidate in this regard. If the company is successful in developing a portable people meter capable of measuring ad exposure in multiple media formats along with subsequent retail visits, Arbitron would be able to address the most important issue among media buyers: ad effectiveness. This could translate to an industry shift, with Nielsen's television ratings service displaced and Arbitron emerging as the dominant media rater, not just television rater.[59]

Potential entrants may come from an even broader market than media ratings. A.C. Nielsen was not a brand new firm when it began collecting radio data in the mid 1930s. The company had started operations in 1923 as a marketing research firm.[60] Including marketing research companies in our collection of potential competitors would expand the list considerably.[61] According to the U.S. Census Bureau, there were 5,359 establishments offering market research services in the United States in 2002 (the most recent year available), generating more than $12 billion in receipts.[62] These companies are the firms that conduct the surveys we receive in the mail, by phone, by e-mail, and occasionally even when we walk down the street. Clearly, many of these marketing research skills are transferable to the specialized task of media research. Thus, market research firms could be viewed as potential competitors in television ratings, if not actual ones.

(last visited Sept. 28, 2005); and VNU (Nielsen's parent company), *About VNU*, *at* http://www.vnu.com/about/subsidiaries/n.html (last visited Sept. 28, 2005).

[59] We suggest here the scenario of Arbitron supplanting Nielsen as the dominant firm, rather than Arbitron re-entering competition with Nielsen because we find that media ratings, like so many other kinds of ratings businesses tend toward concentrated markets. *See infra* Section IV.A. However, note that in 2000 Nielsen and Arbitron entered an agreement whereby Arbitron gave Nielsen the option to join Arbitron in a future deployment of the PPM.system; Nielsen is currently evaluating whether to continue with the PPM project. *See* Ceridian, *Arbitron and Nielsen Media Research Sign Agreement to Evaluate New Audience Ratings Technology*, June 1, 2000, *available at* http://www.ceridian.com/corp/article/0,2868,10965-52649,00.html. *See also*, Joe Mandese, *Nielsen Accelerates Portable People Meter Effort, May Decide Soon*, MEDIA DAILY NEWS, Nov. 15, 2005, *available at* http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticleHomePage&art_aid=36322.

[60] *See* A.C. Nielsen, *Our History*, *at* http://www2.acnielsen.com/company/history.shtml (last visited Sept. 28, 2005).

[61] Market research is a large, unconcentrated market. The four largest firms account for less than 21 percent of industry revenue. The fifty largest firms account for only 55 percent of revenue and less than 10 percent of establishments. The average establishment size is around 25 employees with slightly more than $2 million in revenue. U.S. Census Bureau, *2002 Economic Census, Professional, Scientific, and Technical Services*, 1, 1-5 (Oct. 2004), *available at* http://www.census.gov/prod/ec02/ec0254i09.pdf.

[62] *Id.* at 3.

Finally, satellite and cable companies may enter the media ratings business. As noted earlier, these companies are currently researching the potential for turning content delivery mechanisms—cable boxes and satellite dishes—into viewing data collection devices. While the trickier aspects of this proposition are legal and ethical, not technological, the potential exists for satellite and cable providers to develop substitutes to Nielsen's television ratings, at least for sizable segments of the market.

Potential competitors can exert very real pressure on a dominant firm.[63] The history of media measurement reinforces this point. Throughout the 1980s and 1990s, Nielsen faced a series of challengers in television ratings—each claiming improved technology and better service than Nielsen. R.D. Percy, Arbitron, Audits of Great Britain, and SRI's System for Measuring and Reporting Television (SMART) each contested Nielsen's television rating service.[64] The pressure applied by these rivals appears to have contributed to technological upgrades in audience measurement, including today's People Meter.[65] The challengers failed not because of insurmountable barriers to entry or legal hurdles. Instead, failure appears to have resulted from a lack of understanding of the market, a lack of financial commitment required to firmly establish a television rating service, or simply an untenable business model.[66] Nielsen had to overcome similar obstacles in its years of operation. Factors of this sort typically do not rise to the level of significant barriers to entry.

In addition to the limits that potential competitors place on Nielsen's market power, we should also consider the opportunities for product substitution. Specifically we examine other options that broadcasters, cable companies, and advertising agencies may have to obtain ratings. First, large firms could generate some of their own information. The larger broadcasting and cable firms all have in-house research departments. Both CBS and NBC have

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[63] KATZ & ROSEN, *supra* note 53 at 529. WILLIAM BAUMOL, JOHN PANZAR, & ROBERT WILLIG, CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE (1982).

[64] Joe Mandese, *They Didn't Get SMART: The television industry looks to digital measurement*, 21 AM. DEMOGRAPHICS 33 (Aug. 1999).

[65] *SMART Show is Canceled*, Multichannel News, May 31, 1999; Mandese, *supra* note 64.

[66] *See* Jon Lafayette, *A Brief History of Nielsen Competition*, Electronic Media, Dec. 8, 1997.

large research facilities in Las Vegas.[67] These research departments typically track show popularity for planning and estimating advertising revenues. Internal researchers conduct focus groups and send out questionnaires. These activities currently supplement Nielsen's ratings, but could be expanded if the firms felt that Nielsen's services were no longer accurate or too expensive. For example, when Nielsen reported that competition from cable and satellite programs caused daytime soap opera viewing to drop 18% among female viewers 18 to 34 years of age, CBS investigated the findings.[68]

While it is highly unlikely that national advertisers would accept internal network measures as the sole method of pricing ads, it is possible for the large networks to pool their resources and form a separate non-profit ratings organization.[69] This option has been exercised in other countries.[70] Something similar has been tried in the U.S. as well. Unhappy with Nielsen's broadcast measurements, ABC, CBS, NBC, and Fox commissioned the creation of SMART as a Nielsen competitor.[71] The networks later abandoned their support of SMART. Apparently, the cable companies felt that the new technology used by SMART was geared toward boosting network ratings at their expense. SMART therefore lacked enough support from key industry players for it to become the standard ratings service and the networks made little effort to win that support.[72]

Smaller networks and cable companies have other options as well. While they lack large internal research departments and deep pockets for bankrolling competing television rating

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[67] *See* Hubble Smith, *NBC market research epicenter shifts to LV*. REV. J. (Oct. 30, 2003), *available at* http://www.reviewjournal.com/lvrj_home/2003/Oct-30-Thu-2003/business/22478388.html (last visited Sept. 28, 2005).

[68] Bloomberg later reported that, "Nielsen's numbers not only checked out, they underlined a new reality about U.S. daytime TV: Soap operas, once cash cows for the networks, are fading in popularity." Bloomberg, *U.S. Soap Operas Face Real Melodrama as TV Ratings, Ads Slip*, (May 5, 2005), *available at* http://www.bloomberg.com/apps/news?pid=10000087&sid=aqLu73fFCerc&refer=top_world_news# (last visited Sept. 28, 2005).

[69] Joint ventures might not be possible in the United States due to antitrust concerns.

[70] *See* discussion *infra* Section II.A.2.b.

[71] *See* Joe Terranova, *Ratings Wars*, 20 AM. DEMOGRAPHICS 31 (Oct. 1998); *See also* David Bauder, *For TV's Nielsen ratings, problems with networks are a familiar story*, AP, (Nov.14, 2003), *available at* http://www.knowledgenetworks.com/info/press/news/2003/111403_ap.pdf.

[72] *See* Steve McClellan, *Turner says it won't get SMART*, 127 BROADCASTING & CABLE 62 (Mar. 1997); *See also*, Mandese, *supra* note 64. Arguably, had the networks been serious about displacing Nielsen, they could have modified the technology to address cable companies' concerns.

services, they also lack the pressure for ratings that national advertisers tend to place on the larger players. Smaller programmers are able to poll their viewers directly, and those with local business can rely on their detailed knowledge of the market.[73]

Reports that link TV viewing with consumer purchasing behavior are another important source of information. These reports are currently provided by media and market research firms, such as The Media Audit, The Media Center, IAG, and Simmons Market Research Bureau.[74] Indeed, several smaller stations have decided that these sources of information are sufficient, and have cancelled their contracts with Nielsen.[75]

This analysis suggests a wide variety of potential product substitutes, which can help to limit the potential of the dominant firm to exercise market power in the television ratings market. Losing small customers, knowing that larger customers can rely on internal research or can fund rivals, and knowing that all customers have access to consumer purchasing reports places pressure on Nielsen to be responsive to its clients. Fear of lost sales can be a powerful incentive to maintain quality.

Our analysis of the television ratings market leads us to question whether Nielsen is in fact unresponsive to its customers' needs. It is clearly the dominant firm now, but some clear alternatives loom on the horizon. Arbitron's portable people meter and the cable and satellite companies' data collection devices represent two possible substitutes for today's technology. As economist Joseph Schumpeter has written:

> …in capitalist reality as distinguished from its textbook picture, [what counts] is the competition from the new commodity, the new technology, the new source of supply, the new type of organization…competition which commands a decisive cost or quality advantage and which strikes not at the margins of the

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[73] *See* Allison Romano, *Nielsen Dumped*, BROADCASTING & CABLE, (June 13, 2005), *available at* http://www.broadcastingandcable.com/index.asp?layout=articlePrint&articleID=CA607737. *See also*, Brian Steinberg, *A network's dream: TV viewers who recall commercials*. WALL ST. J. (May 11, 2005), *available at* http://www.post-gazette.com/pg/05131/502690.stm.

[74] Romano, *supra* note 73. These firms conduct recall telephone interviews, along the lines of the first media ratings service provider, Crossley.

[75] *Id.*

> profits and the outputs of the existing firms but at their foundations and their very lives.[76]

Dramatic prose to be sure, but the core message of dynamic competition rings true in a number of segments of the economy.[77] These forces provide market discipline in media ratings as well, and cast doubt on the possibility that Nielsen could abuse its dominant position without consequence.

b. Media Ratings in Other Countries

An examination of television ratings across the globe reveals similar market structures to that found in the United States. Media ratings tend to be heavily concentrated, often with a single firm providing television audience measurement. The one dissimilarity lies in who conducts the ratings. In many parts of the world ratings entities are not independent for-profit companies, but rather are supported by the media providers. For example, in the United Kingdom, the non-profit Broadcast Audience Research Board provides audience measurements. It was formed in 1981 when British broadcasters BBC and ITV joined forces to establish a ratings measurement entity. Currently, the Board is funded by five British broadcasters and is the only provider of audience measurements for all channels across all platforms in the UK, including terrestrial, satellite, and cable.[78] While the Board has its share of critics, the government has not intervened. Instead, disgruntled broadcasters have dropped their use of the Board's service and turned to private market research companies like Swiss-based

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[76] JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 84 (3rd ed. 1950). Schumpeter goes on to note that "It is hardly necessary to point out that competition of the kind we now have in mind acts not only when in being but also when it is merely an ever-present threat. It disciplines before it attacks." (p. 85). These quotes are from the same chapter containing Schumpeter's famous, and oft-quoted, line about the "perennial gale of creative destruction" (p. 84).

[77] For instance, phonograph albums were replaced by 8-track tapes, which were replaced by cassettes, which were replaced by CDs, which are in the process of being replaced by iPods. Computer hardware, with Moore's Law, is another example. (*See* Webopedia, *Moore's Law*, *at* http://www.webopedia.com/TERM/M/Moores_Law.html (last visited Dec. 8, 2005)). For a description of dynamic competition contrasted with traditional static competition, *see* Christian Ahlborn, David S. Evans, & Atilano Jorge Padilla, *Competition Policy in the New Economy: Is European Competition Law Up to the Challenge?*, 22 EUR. COMPETITION L.R.156, 160-161 (2001).

[78] Broadcasters' Audience Research Board, LTD., *at* http://www.barb.co.uk (last visited Sept. 28, 2005).

GFK, which entered the UK market in 2003.[79] Another alternative is emerging from inside the industry. In 2006 the U.K. satellite television company Sky plans to introduce a new way to research its audience's viewing habits by recording what 20,000 of its subscribers are watching.[80]

Comparable efforts led by industry can be seen outside of Europe as well. OzTAM in Australia, which is owned by the three major commercial networks, awarded a seven-year contract to one firm to be the sole provider of television ratings for national subscription services as well as for the five metropolitan area broadcasts.[81] A similar system operates in Russia, where broadcasters and other influential media owners have joined together to create the Media Committee to select a single measurement provider for all of Russia.[82]

Latin America has a single provider of television ratings as well, although in this case it is a for-profit media research firm. IBOPE Media, a subsidiary of the Brazilian Institute of Public Opinion and Statistics, is unique in that it conducts multi-country ratings. It provides television audience measurement in eleven countries throughout the region. Countries it serves include Argentina, Brazil, Chile, and Mexico, which encompass a population 18% larger than the U.S.[83]

Television ratings in Canada follow the global pattern as well. Two television-rating services have been operating there, BBM Canada and Nielsen Media Research. BBM is a not-for-profit organization, owned and operated by broadcasters, advertising agencies, and advertising companies. In July 2004, however, BBM and Nielsen announced an agreement to merge their TV ratings.[84] Advertisers, whose costs are directly affected by television ratings, reacted positively to the announcement. One such media buyer predicted that a single ratings

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[79] *See* Alex Benady. *Watch this space - Barb's chief may seem softly softly, but the ratings body must face up to its critics*. FIN. TIMES. Sep 28 2004, at 1. *See also*, GfK Group, *Management Report for the GfK Group*, *at* http://www.gfk.com/english/investor/finanzberichte/gb2003eng/einzelseiten/gb2003_p090.html (last visited Sept. 28, 2005).

[80] Alex Benady. *Watch this space - Barb's chief may seem softly softly, but the ratings body must face up to its critics*, FIN. TIMES. Sep 28 2004, at 1.

[81] OzTAM, *at* http://www.oztam.com.au/html/about.htm (last visited Sept. 28, 2005).

[82] Alexander Naghalov & Natalia Rostova, *A Ratings Impasse*. WPS: WHAT THE PAPERS SAY. Sept. 8, 2004.

[83] Charles Dawson. *Rating Latin America: Regional overview Our five-part feature analyzes the viewing habits of Latin audiences*. 8 MULTICHANNEL NEWS INT'L. April 2002, at S40(4).

source would avoid the confusion inherent in multiple ratings and cut subscriber costs by eliminating the need to purchase two sets of conflicting measurements.[85] Since ratings are important for negotiating prices and advertising contracts with broadcasters and cable companies, a single set of ratings can provide a standard for negotiations, clarifying contracts and thus reducing enforcement or litigation costs. Similar standardization issues arose in U.S. media ratings in the early years. In 1950, one radio station was so fed up with the inconsistent numbers offered by competing ratings services that it sponsored a full-page local newspaper ad headed "Two Umpires Behind the Plate Isn't Any Good in Broadcasting, Either."[86]

c. Lessons Learned

The available evidence suggests that there are a few key potential competitors that can limit Nielsen's ability to wield market power. Other firms possess the necessary skills to provide television ratings, and internal industry players have the resources to provide ratings if Nielsen were to abuse its position. Indeed, new technologies are under development that could limit Nielsen's market power, and perhaps even displace Nielsen altogether.

Our review of media ratings across the globe also suggests that market forces may lead toward standardization of ratings. Arbitron ceased providing U.S. television ratings in 1993, citing lack of profits as the primary reason. On the end user side, advertisers note transaction costs as a reason to support a single ratings source. For instance, The World Federation of Advertisers argues that

> if other research suppliers provide rival surveys this can be wasteful in terms of the deployment of financial resources available in the market. The money required for two adequate television panels would fund one good panel. It is also wasteful in terms of agency resource[s] in that multiple data sets have to be purchased and reconciled.[87]

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[84] Laura Bracken, *BBM and Nielsen set to merge on TV ratings*, PLAYBACK. July 19, 2004.

[85] *Id.*

[86] Bill Davidson, *Who Knows Who's on Top?*, reprinted in History Matters, *supra* note 23.

[87] WFA Media Committee, The WFA/EACA Guide to the Organization of Television Audience Research, (Jan. 2001), *available at* http://www.wfanet.org/pdf/WFA_guideOrgofTVaudresearch.pdf.

Unlike state-sanctioned monopolies, then, the push toward a single provider in media ratings appears to come from both economies of scale and from customer preference. Moreover, scale in media ratings provision does not appear to create an insurmountable barrier to entry as it frequently does for state monopolies, such as regulated utilities.

We therefore conclude that significant abuse of market power is not apparent. Media ratings clients tend to push for a single standard, which tends to be provided by a single firm. In principle, this firm could have some market power, but we believe this power is limited by the specter of potential competition. Evidently, regulators in most countries agree with our assessment. Most countries throughout the world have one firm, or at least one dominant firm, providing television ratings. What is especially striking about the global pattern is the lack of regulation across diverse regions, even in areas far more prone to government intervention than the United States, such as the European Union. One possible reason we do not see such regulation anywhere in the world is that there is no clear evidence of a significant market failure.

Without a clear market failure, there is not a strong economic rationale for regulation.[88] We, nonetheless, consider the two other regulatory questions we raised at the beginning because they provide insight into the likely impact of implementing proposed alternatives.

B. Feasibility of the Regulatory Plan

To understand whether there is a workable regulatory plan we examine the primary oversight mechanism that is in place now—the Media Rating Council.

1. Existing Oversight

The Media Rating Council (MRC) grew out of a much earlier controversy over media ratings, one that culminated in House hearings in the early 1960s.[89] The final report that emerged from those hearings summarized the importance of media ratings:

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[88] There could be other rationales for regulation, such as the distribution of income. However, regulation is not a particularly effective method for redistributing income. *See e.g.*, Keith J. Arrow et. al., *Is There a Role for Benefit-Cost Analysis in Environmental, Health and Safety Regulation?*, 272 SCIENCE, 221, 221-222 (1996).

[89] Note that the Federal Communications Commission licenses and regulates broadcast operations in the public interest and the Federal Trade Commission is responsible for preventing unfair methods of competition and

> Rightly or wrongly, sponsors react to the audience rating systems. Millions of dollars turn on the ratings levels. The immediate and long-range future of all types of programs—news reports, mysteries, comedies, westerns, etc.—are controlled by the ratings which each show receives. If this rating system is to continue we must make certain that the rating received is the rating achieved—no more, and no less.[90]

A number of industry players agreed with this sentiment and in late 1963 voluntarily formed the Broadcast Rating Council, Inc., the predecessor to the MRC.[91] The Council is non-profit and membership dues fund its activities. The initial members included a number of media associations, such as The National Association of Broadcasters, The Radio Advertising Bureau, and the Television Advertising Bureau. Individual networks joined as well, including ABC, CBS, and NBC. These same organizations are still members today, along with cablecasters, advertisers, advertising agencies, and Internet organizations.[92]

The council's objectives were clearly delineated at the time. In particular, the council specified four goals:[93]

1. To secure for the broadcasting industry and related users audience measurement services that are valid, reliable, effective, and viable;

2. To evolve and determine minimum criteria and standards for broadcast audience measurement services;

3. To establish and administer a system of accreditation for broadcast audience measurement services;

4. To provide and administer an audit system designed to insure users that broadcast audience measurements are conducted in conformance with the criteria, standards and procedures developed.

The second point resulted in the Council issuing its first set of voluntary minimum standards in early 1964. The standards, then and now, focus on two issues. The first issue

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unfair and deceptive practices in interstate commerce. Neither agency had or has a direct mandate to regulate the activities of ratings services. H.R. DOC NO. 89-1212, at 11 (Jan. 13, 1966).

[90] *Id*. at 2.

[91] *Id*. at 2-3.

[92] For the 2004 membership list, *see* Media Rating Council, *2004 Membership*, *at* http://www.mrc.htsp.com/member_organizations.jsp (last visited Sept. 28, 2005).

emphasizes procedural matters, such as training for interviewers, sample construction, spot-checking for fieldwork, and overall quality controls. The second aspect, and the one driven by the industry problems at the time, emphasizes transparency and disclosure in ratings. Ratings firms should disclose their survey methods, known error rates, response rates, and any weighting or adjustment procedures employed.

Transparency is relevant for the controversy today as well. With so much at stake, users of television ratings have strong incentives to understand how the ratings are calculated and how those numbers can be interpreted. Nielsen and other media ratings companies therefore provide considerable detail on how their ratings are constructed to aid the groups relying on ratings for business decisions.[94] These groups, which include broadcasters, cable companies, and advertisers, have an economic incentive to understand the strengths and limitations of the ratings. As a consequence, the argument that government intervention is needed here to protect consumers who do not know any better is not relevant.[95]

The third point above refers to the MRC's accreditation procedures. Accreditation includes an application, a review, and an approval decision. Individual ratings companies, television or other media, can apply to the MRC for accreditation. The Council then designs an evaluation specifically for that applicant. In order to qualify for accreditation, the applicant must furnish all requested information, comply with the minimum standards set by the MRC, and pay for annual audits.[96] A committee comprised of member organizations that use the ratings type in question evaluates the application and makes a recommendation to the MRC Board of Directors. The Board is then responsible for either granting or denying accreditation.[97]

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[93] H.R. DOC NO. 89-1212, *supra* note 89, at 2.

[94] *See* Nielsen Media Research, *About Nielsen Media Research*, *at* http://www.nielsenmedia.com/about_us.html (last visited Sept. 28, 2005).

[95] YVES R. SIMON, THE PHILOSOPHY OF DEMOCRATIC GOVERNMENT: THE PATERNAL FUNCTION OF AUTHORITY, (U. of Notre Dame Press ed., 1st ed, 1993), *available at* http://www.nd.edu/Departments/Maritain/etext/pdg-1b.htm (last visited Sept. 28, 2005).

[96] The audits are conducted by an independent party, such as Ernst & Young. The rating firm pays just for the audit costs and the MRC collects no money for this task. Audit findings are not disseminated to the public, due to the extensive confidential disclosures required. *See Implementation of Nielsen Local People Meter TV Rating System*: *Hearing before Subcomm. on Commun. Comm .on Commerce, Sci., & Transp.*. 108th Cong. 7. (2004) (statement of George Ivie, Executive Director of MRC).

[97] Per July 2004 testimony of George Ivie, *supra* note 96, at 10.

If the MRC finds that an applicant is not eligible for accreditation, it identifies deficiencies, which if fixed will lead to accreditation. MRC procedures stipulate that any disputes should be heard before a three-member panel of the Board.

Given the importance of establishing standards and ensuring measurement transparency, the MRC appears to plays a significant role in the media ratings process. Industry oversight organizations like the MRC can facilitate clear channels of communication between the primary parties involved—the media providers, media advertisers, and media ratings companies. The MRC can help media providers and media buyers understand ratings techniques, and can also provide a mechanism for achieving widespread acceptance of a particular measurement technique. In the case of local People Meters, the MRC appears to be working with Nielsen in a constructive fashion to address the complaints raised by certain Council members.[98] Any change to the MRC's original charter, however, would need to be thought through carefully. It is not clear that additional responsibilities would fit easily within the Council's existing framework, since so many diverse interests—from broadcasters to advertisers to Internet companies—are part of the MRC.

2. Proposed Regulation

As mentioned earlier, the most specific media ratings regulatory proposal is a Senate bill entitled the Fairness, Accuracy, Inclusivity, and Responsiveness in Ratings Act of 2005 (S. 1372). A key provision would make MRC accreditation mandatory before any new television ratings measurement system could be provided. In other words, the Media Rating Council—an industry organization comprised of individual broadcasters and their associations, individual cable companies and their associations, and individual advertising agencies and their associations—would have to approve the specific plan for each local People Meter rollout. Nielsen would not be allowed to offer People Meters in a designated market, such as a city, before obtaining approval. Any new measurement systems would have to undergo a trial period first, with the MRC determining the length of that trial. In addition to brand new measurement

[98] *See* Katy Bachman, *Nielsen Feeling Heat from MRC,* MEDIAWEEK, Apr. 19, 2005; *See also,* Allison Romano, *Nielsen to Wait for LPM Audits*. BROADCASTING & CABLE, June 29 2005.

methods, any changes to existing measurement methods would qualify as "new" under the Act and would thus need to be accredited.

The MRC accreditation process is currently, and has always been, voluntary.[99] While making certification mandatory may be feasible in theory, and is certainly simple from an implementation standpoint, it is possible that accreditation would need to remain voluntary to avoid conflicting with antitrust laws. As the list of members already makes clear, the MRC is composed of competitors. Networks such as NBC and ABC are fierce rivals with each other and with cable organizations such as Fox, Turner, and Discovery. Moreover, traditional networks, cable, minority language channels, advertising agencies, advertising companies, print media, and Internet organizations have divergent commercial interests. Some desire measurement techniques that maximize their own individual airtime revenues; others desire measurement techniques that assist in planning effective multimedia ad campaigns at minimal cost. As a result, some of these organizations are likely to benefit from a proposed change in ratings measurement while others could be harmed by it. Cable companies, who tend to gain from electronic measures, and broadcast networks, which sometimes benefit from poor recall with paper-based measures, will frequently be in this position.[100] If these competing organizations are required to vote on mandatory accreditation, potentially delaying the commercial launch of a new method, it could represent a restraint of trade.[101]

To summarize, the proposed regulation does appear feasible in theory but fraught with implementation problems. Depending on a legal review of antitrust issues,[102] making

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[99] H.R. DOC NO. 89-1212, *supra* note 89, at 4.

[100] *See* the discussion *supra*, II.A.1.

[101] *See* Jonathan T. Howe & Leland J. Badger, *The Antitrust Challenge to Non-Profit Certification Organizations: Conflicts of Interest And a Practical Rule of Reason Approach to Certification Programs as Industry-Wide Builders of Competition and Efficiency*, 60 WASH. U. L.Q. 357, 373, 386 (1982-1983). For more on this consideration as it pertains to media ratings, *see* Letter from Susan Whiting, CEO of Nielsen Media Research, to Senator Charles Schumer, (August 2, 2004), *available at* http://www.nielsenmedia.com/forclients/SDW%20Response%20to%20Sen%20Schumer%207-29-04.pdf.

[102] The National Association of Broadcasters sought clarification on the legality of MRC *voluntary* accreditation from the Department of Justice after the 1964 hearings. William Orrick, then Assistant Attorney General of the Antitrust Division, neither dismissed nor confirmed concerns over the antitrust status of accreditation. In particular, he wrote, "The Department is concerned, however, that in operation the proposal [establishment of voluntary minimum standards for accreditation of broadcast rating services] may have the effect of a boycott of non-approved services and may result in stifling innovation[ ] and other forms of competition in providing broadcast rating services. For that reason, this waiver does not represent an undertaking not to bring civil

accreditation by the MRC a requirement before introducing any new measurement service or making any change to an existing one is a straightforward matter relying on existing infrastructure. Nonetheless, mandatory accreditation does not appear advisable given the diversity of goals within the membership of the MRC. We explore the costs and benefits, a separate question from feasibility, below.

C. Regulatory Benefits and Costs

The benefits associated with required accreditation are relatively easy to determine. First, as advocates of regulation suggest, mandatory certification could be used to check any abuse of market power wielded by a ratings firm. For example, if a proposed ratings system change did not represent an improvement in technology or a more efficient means of measurement, the MRC could prevent its rollout. Second, the standards for measurement quality and process transparency that the MRC encourages with its guidelines could be enforced under a system of mandatory certification. Ratings agencies not complying with all quality and disclosure rules would not receive accreditation. Finally, mandatory accreditation might be helpful in encouraging competition in that it could provide new ratings firms with an industry-recognized seal of approval.

A number of costs associated with mandatory accreditation are easily identifiable as well. First, in any industry undergoing technological change, regulatory hurdles should be considered very carefully. A mandatory approval process has the potential to hold back welfare-enhancing changes because committee decisions are necessarily more time consuming than unilateral action.[103] In this case, rapid changes in media delivery—video on demand, streaming media over the Internet, and time-shifting technologies such as Tivo and ReplyTV—are changing the industry's media ratings requirements. Waiting for MRC accreditation could slow the ability of rating services to respond to these changes in a timely manner.

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proceedings against the proposal." Letter from William Orrick, Assistant Attorney General, Department of Justice, to Douglas A. Anello, Gen. Couns., Nat'l Ass'n of Broadcasters (July 16, 1964).

[103] *See* Tim Simcoe, Committees and the Creation of Technical Standards (Working Paper for the University of California at Berkeley, Haas School of Business, 2003); *See also*, Debra A. Valentine, Gen. Couns. of FTC, Remarks before The Interdisciplinary Center Herzlia, The Arison Sch. of Bus. & The Israeli Antitrust Authority:

Second, because the MRC is composed of media ratings users, there will always be groups within the Council that have a vested interest in the ratings tools used. Some users are likely to benefit economically from a measurement change while others would be hurt. The accreditation process thus has the potential to be manipulated by those interested in private rent seeking.[104]

Consider the political efforts involved in the current controversy. Shows broadcast by the Fox Television Stations Group, a division of the News Corporation, were particularly hard hit in test runs of local People Meters in New York City.[105] Rupert Murdoch's News Corporation, and the lobbying groups it has funded, subsequently spent between $5 and $7 million dollars mobilizing public opinion against Nielsen's local People Meters.[106] In response, Nielsen spent roughly the same—$4 to $6 million—on lobbying aimed at defending its technology, research quality, and impartiality.[107] It seems reasonable to expect such expenditures on a regular basis under a system that requires mandatory accreditation. Each media faction that stood to lose ground relative to its competitors would likely be encouraged to engage in public relations efforts to influence the accreditation outcome, or at least to slow down acceptance of the new method. Delaying the process of accreditation could produce substantial economic gains for certain businesses.

Industry Self-Regulation and Antitrust Enforcement: An Evolving Relationship (May 24, 1998), *available at* http://www.ftc.gov/speeches/other/dvisraelspeech.htm.

[104] For example, conflicts of interest led to an SEC investigation that prompted NASD to split into two separate entities, NASD Regulation for the oversight of the securities industry and Nasdaq Stock Market for the operation of NASDAQ. Robert Glauber, Chairman & CEO, Nat'l Assoc. of Sec. Dealers, Inc., Remarks in Oversight Hearing on "Accounting and Investor Protection Issues Raised by Enron and Other Public Companies" (Mar. 5, 2002), *available at* http://banking.senate.gov/02_03hrg/030502/glauber.htm.

[105] *See* Hernandez & Elliott, *supra* note 13; *See also*, *Rating the Ratings*. Editorial, N.Y. TIMES. Aug. 25 2005, at 22.

[106] *Id.* (Figures as of summer 2005). Along with "Don't Count Us Out," News Corp has funded various Democratic party insiders and lobbying groups such as Glover Park Associates and Dewey Square Group. *See Report: News Corp. Courts Democrats.* CNN MONEY, Aug. 9, 2005, *at* http://money.cnn.com/2005/08/09/news/fortune500/newscorp_dems/; Jim Synder, *NewCorp. Marshals Lobbyists*. THE HILL, Sept. 27, 2005, *available at* http://www.hillnews.com/thehill/export/TheHill/News/Frontpage/081005/news.html.

[107] Again, statistics as of summer 2005. Lorne Manly & Raymond Hernandez, *Nielsen, Long a Gauge of Popularity, Fights to Preserve Its Own*. N.Y. TIMES, Aug. 8, 2005, at C2; Brody Mullins, *News Corp. Turns on Charm — Fox Parent Woos Democrats to Help Block New Ratings Systems*. WALL ST. J. EUR. Aug. 10, 2005.

Similar issues arise in other standard setting situations. Consider, for example, standard setting groups for Internet technology. The Internet Engineering Task Force (more commonly known as the IETF) "is a large open international community of network designers, operators, vendors, and researchers concerned with the evolution of the Internet architecture and the smooth operation of the Internet."[108] For industry participants, Internet protocol and design decisions can have a dramatic impact on their business and their profits. Empirical research suggests that as the stakes increase, an uneven distribution of benefits from adopting a standard tends to prolong the committee decision-making process.[109] In other words, when some members stand to gain while others stand to lose, committee decision-making gets bogged down and standard setting is delayed. We would expect similar results with mandatory accreditation in media ratings.[110]

Finally, mandatory accreditation could hinder competition in the ratings industry. Accreditation would represent a barrier to entry for potential entrants into the ratings business.[111] Thus, mandating that firms have a seal of approval has costs as well as benefits.

Industry insiders without a vested interest in ratings outcomes have generally argued for maintaining the voluntary nature of the accreditation process. In his testimony before the Senate in 2004, George Ivie, the Executive Director and CEO of the MRC, observed, "Nielsen

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[108] The Internet Engineering Task Force, *Overview*, *at* http://www.ietf.org/overview.html (last visited Sept. 28, 2005).

[109] Simcoe, *supra* note 103.

[110] Another frequent theme in the standards literature is that of path dependence. *See* Joseph Farrell & Garth Saloner, *Standardization, compatibility, and innovation*, 16(1) RAND J. ECON. 70, 70-83 (1985). Some argue, for example, that a quirk of history can set a standard on the path to acceptance even when other, technically superior options are available. One such example raised in the literature is the QWERTY keyboard. *See* Paul David, 75 *Clio and the Economics of QWERTY*, AM. ECON. REV. 332 (1985). While these arguments are based on formal mathematical models, it is important to remember that they are just models. As Liebowitz and Margolis argue "…the economic models of path dependence fail to capture what is important about the working of real-world markets. That is why, for all their formal correctness, for all their internal consistency, these models fail to capture what is borne out in the real world." *See* STAN J. LIEBOWITZ & STEVEN E. MARGOLIS, *Winners, Losers and Microsoft* 50 (1999). In the particular case of media ratings, it seems unlikely that Nielsen's measurements represent the "wrong" standard. Up through 1993, Nielsen competed directly with Arbitron in television ratings; Arbitron could have been chosen as the standard but was not. Before that, in the mid 1980s, a series of challengers attempted to push Nielsen out—one was even sponsored by the broadcast networks. These episodes suggest that opportunities to shift standards have in fact arisen, but were not taken to conclusion. Were Nielsen the "wrong" standard, industry participants would have had strong incentives to support one of these challengers.

[111] We see this very outcome in the credit and bond ratings industry. See *infra* Section III.

will fix the problems we bring in front of them. It takes time and they have to do it right and eventually things will get accredited and work."[112] Certainly Nielsen has faced some difficulties in implementing People Meters in some cities, especially in establishing accurate samples.[113] But Nielsen does not have a vested interest in a particular ratings result. It does, however, have a profit motive for advancing sound ratings methods, because this could enhance its reputation and add to its bottom line. As one advertising agency representative noted at the start of the present controversy:

> I don't know anyone who believes that electronic devices aren't a better way to capture information rather than someone's memory. The diary system was invented when there were basically three networks and the entire family watched TV on one set, and so it was very easy to mark down what shows were watched.[114]

The issue, then, is not one of moving to an untested technology, but rather one of moving to a well-tested, improved technology in a careful and accurate way. There seem to be issues in implementing this technology in local markets, but the voluntary MRC system is already well equipped to oversee this task. In the end, we believe that the potential benefits from moving to a mandatory accreditation system do not justify the probable costs.

If the MRC does not move to mandatory accreditation, another regulatory possibility is government oversight. The case for general regulation is even harder to make, though. The debate at hand is over television ratings measurement quality. No evidence of fraud has been put forth, nor are public health or safety issues involved. Given the circumstances, the findings that emerged from the House investigation into the media ratings industry in the mid 1960s are still relevant today. As the 1966 Harris Report concluded, "It is highly doubtful, however, that Government regulation of the operation of rating services, at this time at least, is likely to be more effective than a well-administered program of industry self-regulation."[115] The reason is that the government has far less information on the appropriate quality standards than the

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[112] Per July 2004 testimony of George Ivie, *supra* note 96.

[113] Toni Fitzgerald, *People Meter Hits an LA Speed Bump*, MEDIA LIFE, Mar. 18, 2004, *available at* http://www.medialifemagazine.com/news2004/mar04/mar15/4_thurs/news3thursday.html.

[114] Jane Collins, vice president of release for Adlink, as quoted in Meg James, *Nielsen Meters Will Alter Local TV Ratings*, L.A. TIMES, Feb. 25, 2003, at B1.

[115] H.R. DOC NO. 89-1212, *supra* note 89, at 18 (and at 21 for similar sentiments).

industry players themselves. Add in the government's relatively slow response time, and it appears that government regulation of media ratings could easily do more harm than good if it were adopted.[116] The FTC has agreed with this view, noting that voluntary self-regulation via the Media Rating Council appear to be working and are "more transparent and reliable" than government regulation would be.[117]

III. THE ECONOMIC ARGUMENT FOR DEREGULATING CREDIT AND BOND RATINGS

While the media industry struggles with the question of regulating the provision of television ratings, the finance industry is grappling with the detrimental effects of the ratings regulation it already has. Credit and bond ratings firms, such as Moody's and Standard and Poor's, provide a standardized measure for evaluating creditworthiness. These ratings firms evaluate business and government offerings of debt instruments to investors.[118] They estimate the likelihood of a firm defaulting on a loan. The familiar letter grades for bonds issued by Moody's—Aaa, Ba, C, and so on—can help investors make more informed choices about purchasing debt instruments. In addition, a bond's rating affects the interest a bond issuer must pay to attract purchasers.[119]

Before a firm can provide bond ratings, it must obtain a license from the SEC. Critics contend that regulation in this area has been fraught with unintended consequences, creating new problems instead of solving existing ones. As a result, Congress is considering altering the mandatory SEC accreditation process. In this section, we analyze the economics of bond and credit ratings regulation, covering the same three questions as for media ratings.

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[116] Debra A. Valentine, General Counsel of FTC, Remarks before The Interdisciplinary Center Herzlia, The Arison School of Business, & The Israeli Antitrust Authority: Industry Self-Regulation and Antitrust Enforcement: An Evolving Relationship (May 24, 1998), *available at* http://www.ftc.gov/speeches/other/dvisraelspeech.htm; Solveig Singleton, *Regulatory Obstacles to Innovation: Is Self-Regulation The Answer?*, THE CATO INST. (Sept. 13, 1999).

[117] *FTC tells congress to stay out of US TV ratings row*, RES. Apr. 13, 2005, *available at* http://www.research-live.com/index.aspx?pageid=30&newsid=828.

[118] David Ellis, Different Sides of the Same Story: Investors' and Issuers' Views of Rating Agencies (Babson College Working Paper, 1997).

[119] Bill Rini& Mike Tinnemeir, *Bonds – Moody Bond Ratings*, Nov. 12, 2002, *available at* http://invest-faq.com/articles/bonds-moody-ratings.html.

A. A Brief History of Bond Ratings

The early history of credit and bond ratings firms follows a pattern similar to media ratings: information asymmetries between buyers and sellers created an opening for independent rating firms. Starting in 1909, John Moody published the first bond rating for railroad bonds.[120] A few years later, in 1916, the Standard Statistics Company—the "Standard" in today's Standard & Poor—entered the market. Fitch Publishing Company entered shortly thereafter, in 1924. Corporate financial disclosure in these early years was quite limited, so the three bond raters served a useful purpose in smoothing information discrepancies between bond sellers (borrowers) and bond buyers (lenders).[121] The bond raters sold their ratings directly to investors in the form of manuals, a viable business model at time given that photocopy machines, computers, and the Internet were all yet to be invented.

In the 1970s, bond raters shifted from selling directly to investors toward selling directly to issuers. Some scholars have speculated that low-cost photocopy played an important role in the move, while others point to the contribution made by certain historical events in the financial community.[122] Regardless of the cause, today's credit and bond raters work with issuers in evaluating offerings, and they are paid by those issuers. The vast majority of bond issuers request ratings, referred to as "solicited" ratings.[123] The issuer pays the rating firm a one-time fee and assists that firm with any additional information it needs. The rating firms then make the resulting ratings public. Unsolicited ratings are those that the ratings firms

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[120] *See* GILBERT HAROLD, BOND RATINGS AS AN INVESTMENT GUIDE: AN APPRAISAL OF THEIR EFFECTIVENESS (1938). Note that bond rating was not the first form of financial rating. Credit rating agencies first began to appear in the mid 1800s. Richard Cantor & Frank Packer, *The Credit Rating Industry*, FED. RES. BOARD N.Y. Q. REV. 1 (1994).

[121] Securities and Exchange Commission rules regarding corporate financial disclosure were not promulgated until 1933. Note that developing economies still face significant information asymmetries. According to an article in The Economist, "When representatives in Kenya of three of the world's largest banks were asked what single event would most encourage their institutions to become more involved with microfinance, they all came up with the same answer: the presence of credit-rating agencies." *Critical Acceptance*, THE ECONOMIST, Nov. 5, 2005.

[122] In particular, the Penn-Central bankruptcy in 1970 may have increased issuers' willingness to pay for high quality bond ratings to distinguish themselves from rivals. Lawrence J. White, Good Intentions Gone Awry: A Policy Analysis of the SEC's Regulation of the Bond Ratings Industry at 5 (Working paper presented at AEI Conference "Improving the Credit Rating Industry," 2005).

[123] Lawrence J. White, *The Credit Rating Industry: An Industrial Organization Analysis, in* RATINGS, RATING AGENCIES AND THE GLOBAL FINANCIAL SYSTEM 14 (R.M. Levich, G. Majnoni, & C.M. Reinhart, eds. 2002).

provide without funds or information from the rated company. This is a relatively rare occurrence.[124] Virtually all corporate bond issuers prefer the opportunity to present their financial information directly to a rater and thus avoid unsolicited ratings.[125]

B. The Market Failures Justifying Government Intervention

Credit and bond rating firms operated for many years without any regulation at all. The Great Depression, which saw an unprecedented number of bank failures,[126] brought on the first round of regulation affecting the rating firms. In 1931 the U.S. Treasury Department, through the Office of the Comptroller of the Currency which regulates nationally chartered banks, officially required banks to use current market prices for any bonds in their portfolio that were below "investment grade" as published in "recognized rating manuals."[127] The purpose of the move was to require banks to more accurately reflect the level of risk their investments were exposed to. In 1936, the Comptroller moved to an even stronger stance on risk, mandating that banks could not even hold bonds that were below investment grade.[128] The provision is one facet of the so-called "safety and soundness" regulations for banks intended to prevent bank failures.[129]

The market failure behind the 1936 law was clear to all at the time. When a bank fails, it can create harm for businesses and consumers, especially if there is a widespread loss in confidence.[130] The government felt that depositors were unable to distinguish a financially

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[124] It is also quite controversial. Some companies have accused bond ratings firms of issuing low unsolicited ratings as a threat to push companies to solicit ratings from them. Moody's was accused of this tactic in 1993, but was successful in court. *See* Jefferson County School District No. R-1 v. Moody's Investor's Services, Inc., 175 F.3d 848 (10th Cir. 1999). For a discussion of this case, bond raters in litigation, and the broader issue of unsolicited ratings, *see* Frank Partnoy, How and Why Credit Ratings Agencies Are Not Like Other Gatekeepers, (2005) (Working Paper, presented at Nomura-Brookings Seminar on Financial Gatekeepers, 2005).

[125] Ellis, *supra* note 118, at 2.

[126] Over the course of 1930, 1350 banks suspended operations. *See America's Great Depression at* http://www.amatecon.com/gd/gdtimeline.html (last visited Oct. 27, 2005).

[127] Investment grade is generally set at the "BBB" rating level. Richard Cantor & Frank Packer, *The Credit Rating Industry*, FED. RES. BOARD N.Y. Q. REV. 6 (1994).

[128] *Id*. at 6; White, *supra* note 122, at 5.

[129] Cantor & Packer, *supra* note 127.; White, *supra* note 122, at 1-2.

[130] The Great Depression marks a notable period in the history of bank failures. By 1933, depositors witnessed the loss of $140 billion dollars through bank failures, and by the end of the 1930s, a total of roughly 9,000 banks

sound bank from a risky one, primarily due to information asymmetries.[131] Thus the purpose of the safety and soundness laws is understandable. Worried about continued bank failures triggered by poor investments, the government sought to establish a level of risk above which national banks could not invest. The new rule had a far-reaching impact. Of the approximately 2,000 listed and publicly traded bond issues available at the time, over 1,000 did not meet the definition of "investment grade." Thus, the rule drastically reduced viable investments.[132] In addition, the government effectively created a guaranteed market for credit and bond raters.

Despite its well-intentioned origins, the investment grade regulation had problems from the start. The Comptroller's ruling mentioned "recognized rating manuals," but did not specify whose manuals were recognized. The industry generally understood the phrase to cover the three incumbent general-purpose bond raters, Moody's, S&P, and Fitch. The regulation, however, did not rule out other raters and made no mention of new entrants to the bond ratings field. Without the assurance of legitimate ratings, though, the risk ceiling holds little meaning in practice. For instance, if unscrupulous raters could be found, they could issue any grade for a price, rendering "investment grade" vacuous.

The problem of defining recognized ratings manuals led to the next round of regulation, albeit quite slowly, in 1975. In that year, the Securities and Exchange Commission (SEC) designated bond rating firms as "nationally recognized statistical rating organizations" (NRSROs), requiring SEC approval for all raters before they can start operations.[133] The three firms operating prior to the law were all grandfathered in as NRSROs. Again, the motivation behind the regulation is easy to understand. The initial rules regarding bank investment portfolios had created a new government-induced failure—bond rating manipulation. By

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had failed. *See* Living History Farm, *at* http://www.livinghistoryfarm.org/farminginthe30s/money_08.html (last visited Oct. 27, 2005).

[131] David Miles, *Optimal Regulation of Deposit Taking Financial Intermediaries*, 39 EUR. ECON. REV. 1365, 1365-1384 (1995).

[132] Frank Partnoy, *The Siskel and Ebert of Financial Markets?: Two Thumbs Down for the Credit Rating Agencies*, 77 WASH. U. L.Q. 620, 688 (1999).

[133] *See* Shadow Financial Regulatory Committee, *SEC Standards For Designating Nationally Recognized Credit Rating Organizations*, Dec. 9, 2002, *available at* http://www.aei.org/publications/pubID.25,filter.all/pub_detail.asp. A few other specialized raters exist, but only three firms provide general-purpose debt ratings. For a detailed evaluation of SEC regulation, *see* White, *supra* note 122.

designating who could and who could not provide bond ratings, the SEC hoped to eliminate this loophole.

Once again, however, the new rules created new problems even as they solved old ones. The SEC never specified the criteria by which a firm might be admitted to recognized status.[134] The first new admissions were in the early 1980s, with a couple more in the early 1990s. At neither point did the SEC clarify how and why it had approved the new firms. There was no formal regulatory review, and proceedings were not transparent. Moreover, very few new designations were made—perhaps because of the ambiguity in accreditation requirements.

The bond rating industry, like the media ratings industry, is now and has always been small. Today only three general-purpose bond raters exist: Moody's, S&P, and Fitch, with Moody's being the largest.[135] Over the full history of the bond ratings industry, 1909 to the present, there have never been more than 5 firms in operation.[136] As one industry scholar observed, "the fewness of the bond rating firms contrasts sharply with the thousands of stock analysts, employed by hundreds of securities firms, who regularly offer opinions about companies' equity share price prospects."[137] The traditional economic factors of economies of scope and scale are part of the reason, since the raters must build their expertise and reputation across a multitude of industries offering bonds.[138] But another reason lies behind the concentration found in bond ratings, one that sounds remarkably close to media buyers' comments over the benefits of conformity in media ratings: "lenders (bondholders) may well prefer having only a few standardized ratings and raters, so that the lenders can more readily make comparison of the ratings…"[139] On top of these market forces already at work, it seems

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[134] White, *supra* note 122, at 7.

[135] Moody's rates 20,000 public and private issuers in the United States and around 1,200 non-U.S. issuers. S&P rates slightly fewer issues in each category. Partnoy, *supra* note 132.

[136] White, *supra* note 123, at 8.

[137] *Id.* at 10.

[138] Varian observes that returns to scale are a common feature of information goods, such as ratings. *See* Hal Varian, Markets for Information Goods (UC Berkeley Working Paper, 1998).

[139] White, *supra* note 123, at 11-12. White reiterates this view in a later paper as well. *See* White, *supra* note 122, at 4. David Ellis concurs: "If a rating from one agency is not viewed as conveying the same information as one from another agency one would expect one of two things to occur. Investors will either examine the ratings of as many agencies as possible … or they will restrict themselves to the ratings issued by those agencies they

clear that the SEC regulation has further limited entry.[140] In the thirty years of licensing rules for bond ratings, only 6 entrants have been permitted, and all of them have subsequently consolidated with other raters or have exited the market altogether.[141]

Some scholars have argued that the SEC's recognition rule has had the unintended consequence of lowering the value of credit and bond ratings.[142] For example, White contends that the SEC's safety-and-soundness regulation of financial institutions, which requires the institutions to use credit and bond ratings in their decisions to purchase or hold debt instruments, has artificially raised prices in the ratings industry. Regulation-induced demand coupled with the recognized rater designation, which creates a barrier to entry, has harmed the overall industry.[143] In his analysis of the industry, Partnoy makes an even stronger argument against existing regulations. He maintains that the protected status for raters engendered by SEC rules has led to a "decline in the informational value of credit ratings, [and] also creat[ed] incentives for the agencies to provide inaccurate ratings …"[144] He concludes that "the overriding message is that regulatory licenses are costly. They create oligopolistic pressure, and exacerbate rent-seeking among already concentrated industries."[145] In other words, regulation has tended to increase the market power held by ratings firms.

C. Evaluating the Proposed Regulatory Change

In light of past regulatory failures, in 2005 Congress proposed a new round of modifications to the rules governing credit and bond ratings. A bill introduced in the House in 2005—The Credit Rating Agency Duopoly Relief Act—calls for eliminating the recognized rater designation and replacing it with a more flexible SEC registration process intended to

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consider to be the most reliable and consistent… From the results [presented here], it seems that the second option is the one pursued by most institutional investors…" Ellis, *supra* note 118, at 16-17.

[140] White, *supra* note 123, at 13-14. For more on the negative effects of SEC regulation, *see* Partnoy, *supra* note 132.

[141] White, *supra* note 123, at 13.

[142] In addition to those mentioned in the text, *see* Alex J. Pollack, AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, END THE GOVERNMENT SPONSORED CARTEL IN CREDIT RATINGS (2005).

[143] White, *supra* note 123, at 22-28.

[144] Partnoy, *supra* note 132, at 623-624.

[145] Partnoy, *supra* note 124.

increase competition.[146] Under this plan, firms could provide credit and bond ratings simply by registering with the SEC. Thus, the plan appears feasible. It is modeled on other financial rules and could reduce the regulatory burden currently placed on the SEC.

A cost-benefit analysis of the Duopoly Relief Act is somewhat complicated since broader banking regulations are confounded with the narrower aspects of rating firms. The proposed Act could be successful in encouraging competition in the bond ratings industry by permitting "the 130-plus non-NRSRO agencies to compete with NRSROs."[147] It might also enable entirely new companies to enter the ratings market. Expanding competition can be a tangible benefit, although in this case, where standards are clearly important, it may not be. Recall that the industry was concentrated long before the regulatory barriers to entry were imposed. Nonetheless, even if market forces maintain the oligopolistic nature of bond ratings, removing artificial barriers to entry is still a good idea. Moreover, the administrative costs appear to be minimal, since they simply shift accreditation to registration within the same government agency. On the other hand, the proposed bill does not address the root causes of the problems, which lie in regulations aimed at banks, not those directed at credit and bond rating firms. For instance, White argues for shifting all safety and soundness determinations onto the banks themselves, with regulatory oversight by the SEC. This step would separate banking regulations from rating regulations, and would therefore eliminate the regulation-induced demand for ratings.[148] It would also eliminate altogether the need for any SEC recognized status for credit and bond raters.[149] Garnering support for such a strong move would likely be difficult, though.

In the end, a cost-benefit assessment of the Duopoly Relief Act requires an assessment of the political environment. While the bill may not go far enough, as White and others argue, it

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[146] H.R. 2990. 109 Cong. (June 20, 2005), *available at* http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.2990.IH (last visited Nov. 29, 2005).

[147] Partnoy, *supra* note 145, at 55.

[148] Of course, a separate cost-benefit analysis would need to be conducted to determine whether this move enhanced banking efficiency. We just consider ratings firms here.

[149] *See* White, *supra* note 123, at 15. The proposed legislation may be challenged on constitutional grounds as well. *See* Alec Klein, *Credit Raters Speak Against Oversight*, THE WASHINGTON POST, June 30, 2005, at A08.

does offer an improvement over the status quo for the credit and bond ratings market, and we therefore believe that it represents a step in the right direction.

Aside from the specific lessons of regulating credit and bond ratings, this industry's story provides a more general cautionary tale for policy makers. As White concludes, "The good intentions [of the SEC] were to improve safety-and-soundness regulation of financial institutions, and even to use 'market' information to do so. But the unfortunate result has been a distortionary entry restriction regime with respect to bond rating firms."[150] It is reasonable to expect similar problems in media and other ratings industries. Like the SEC and its lack of transparent accreditation procedures, the MRC's accreditation process tends to be informal. Mandatory approval of media rating techniques could easily translate into opaque barriers to entry in television ratings. The broader lesson is that regulation often has unintended consequences that can shift an industry in undesirable ways, raising prices and ultimately harming the very consumers that the regulation was intended to protect.[151]

IV. A BROADER LOOK AT RATING FIRMS

We have now considered two important ratings markets operating in two very different industries. The exact form of the ratings differs between the two as well: media ratings measure past performance while bond ratings measure expected performance. Despite the lack of commonality, we see some striking similarities in the provision of bond and media ratings: the information asymmetries that led to the original ratings providers, the long-term concentration in the ratings markets, end user preferences for a rating standard, and a history of rater freedom in determining ratings measurement methods. The two case studies thus raise the question of whether broader parallels exist across a number of industries that rely on ratings. Here, we consider several other ratings applications in an attempt to shed light on that question. After noting the prevalence of ratings firms throughout the economy and summarizing their basic features, we discuss two more ratings industries with relevant lessons for regulation.

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[150] White *supra* note 123, at 2.

[151] Sam Peltzman, Professor, U. Chi., Lecture presented at the AEI-Brookings Joint Center, Regulation and the National Progress of Opulence (Sept. 8, 2004), *available at* http://www.aei-brookings.org/admin/authorpdfs/page.php?id=1144.

A. Ratings Throughout the Economy

Regardless of the industry, ratings firms can provide a standard for making comparisons, enabling buyers and sellers to negotiate and transact more efficiently. In some instances, third party ratings and evaluation services can help to "pierce the fog of asymmetric information," enabling more informed purchases.[152] For example, the three large consumer credit agencies provide information to prospective lenders and employers on an individual's creditworthiness. *BusinessWeek* and *US News & World Report*, along with several other news publications, provide business school rankings to help their readers choose among schools;[153] and Michelin provides ratings information to prospective diners on the quality and service of restaurants. In other instances, the presence of a rater who measures performance against some threshold enables purchases to be blissfully ignorant of quality without suffering any consequences.[154] In this category, the Good Housekeeping seal and Underwriters Lab labels help consumers select high quality products without having to learn anything about them. These are just a few examples of the ratings organizations that operate in the economy today—-all of which emerged to fill an informational need and survive on the basis of their reputations.[155]

Table 1 provides an overview of different kinds of rating and certification organizations.[156] The first column presents the industry. As the table illustrates, in several

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[152] White, *supra* note 123, at 41-63. *See* KATZ & ROSEN, *supra* note 53, at 398-399.

[153] This ratings industry has evidently proliferated in recent years. As The Economist observed recently, "In the absence of a single incontrovertible measure of performance, the rankings provide a degree of accountability in an educational niche where there is too little. …surveys show, however, that the more the lists proliferate and differ, the less attention students pay to them." *The Year of Listing Differently*, THE ECONOMIST, Sept. 22, 2005.

[154] Daniel B. Klein, *The Demand for and Supply of Assurance, in* MARKET FAILURE OR SUCCESS: THE NEW DEBATE 181 (Tyler Cowen & Eric Crampton eds., 2002).

[155] In addition to reducing informational disparities between parties, some of these ratings organizations contribute new information to all parties. *See* Ginger Jin, Andrew Kato, & John List, *That's News To Me! Information Revelation in Professional Certification Markets* (Working Paper, 2005) citing David Blackwell, *Equivalent Comparison Of Experiments*, 24 ANNALS OF MATHEMATICAL STATS, 265, 265-272 (1953). Information creation appears to be part of the ratings process with product safety testing, educational testing, and media ratings, to name a few.

[156] Ours is a thorough but not exhaustive listing of ratings markets. We consider private sector formal organizations, for-profit and non-profit, only. Government ratings are excluded, as are online only ratings websites. We define ratings firms as entities providing an ordinal measure of some aspect of a product or service, such as a restaurant quality rating or a television audience rating. Certification organizations certify

instances a number of different kinds of ratings firms operate within a single industry. The next two columns show the kinds of information the rating firms provide. For example, within the media industry video game raters provide information on the age appropriateness of individual video games, enabling game purchasers—parents among them—to make better decisions on which games to buy. Note that several different rating models are included in the table. Some firms, like Nielsen Media Research, measure performance according to a scale. Others, like auto safety testers, measure performance and indicate a "passing" grade. The fourth column names the predominant rating firm (or firms) operating in the market. The fifth column shows the total number of rating firms, which provides a crude measure of industry structure. The second to last column lists key users of the ratings. The final column indicates the presence of any regulation or oversight.

whether a product or service meets some predetermined standard of acceptance, such as whether a hospital meets a minimum quality of care metric. For information on the sources supporting Table 1, *see* Appendix A.

Table 1: U.S. Ratings and Certification Organizations

Industry	Units Rated	Rating Method	Primary Raters	# of Raters	Ratings Users	Oversight/ Regulation
Media	TV: audience for channels, programs	Sample – diaries, meters, telephone	Nielsen	1	Broadcasters, cable, satellite, advertisers, ad agencies	Voluntary: MRC
	Radio: audience for stations, programs	Sample – diaries	Arbitron	2	Broadcasters, satellite, advertisers, ad agencies	Voluntary: MRC
	Movies: Age appropriateness of film content	Subjective review of each film	MPAA	1	Media companies, parents	Voluntary: consumer groups
	Video Games: Age appropriateness	Individual review	ESRB	1	Game makers, consumers	None
Finance	Bond issuer solvency	Financial analysis	S&P, Moody's	3	Debt issuers, investors	SEC controls firm entry
	Consumer credit solvency	Financial history analysis	Experian, Transunion, Equifax	3	Lenders, employers, consumers	SEC controls firm entry; FCRA guides procedures
	Expected stock performance	Financial & management analysis	Morningstar	1,000s (analysts)	Public companies, investors	SEC controls firm entry
	Stock analyst performance	Buy-side surveys	Institutional Investor Magazine	1	Institutional investors	None
	Mutual fund performance	Financial analysis	Morningstar	7	Investors	SEC transparency rules
Health Care	Quality of health care providers	On-site review, surveys	JCAHO	5	Hospitals, HMOs; Drs; consumers	DHHS recognizes agencies
	Quality of hospitals	Voluntary surveys or CMS/state data	Leapfrog, Healthshare, Healthgrades	3	Hospitals	None

Table 1 Continued: U.S. Ratings & Accreditation Organizations

Industry	Units Rated	Method	Primary Raters	# of Raters	Ratings Users	Oversight/ Regulation
Education	College entrants' aptitude	Standardized tests	ETS	2	Colleges, Students	None
	K-12 student aptitude	Standardized tests	Harcourt Ed. Measurement, CTB McGraw-Hill, NCS Pearson, Riverside Pub	4	K-12 schools, parents, government	None
	Undergraduate Institutional quality	Outcome analysis, review	US News	8	Colleges, students, parents	None
Consumer Goods	Quality and safety of cars	Physical tests	NHTSA, IIHS	4	Car makers, consumers	None
	Product Quality	Physical tests	Consumer Reports, J.D. Power, Good Housekeeping	3	Manufacturers, consumers	None
	Product Safety	Physical tests	UL	18	Manufacturers, consumers	OSHA – some firm entry
	Sports Card authenticity & quality	Physical inspection	PSA, BGS, SGC	5	Card makers, collectors	None
	Software Security	Laboratory evaluations	BITS Financial Services Security Lab, ICSA Labs	2	Gov[157] software consumers	None
Food & Travel	Restaurant quality	Surveys, on-site evaluation	Zagat, local reviewers	1,000s	Restaurateurs consumers	None
	Hotel/motel quality	Physical inspection	AAA	5 national	Hotels, motels, travelers	None
Environ-ment	Standards of animal care	On-site review, self-evaluation	American Zoo and Aquarium Association	1	Zoos, aquariums	None
	Product environmental friendliness [158]	Physical tests	EPA	3	Manufacturers, consumers, gov.	EPA – firm entry

[157] The federal government uses Common Criteria Certification (an ISO standard) before purchase of IT products to assess the security and assurance. *See Actional Achieves EAL Assurance Critical Security Certification*, Wireless News, Feb. 11, 2005.

[158] Niche players also exist among raters in various industries. In product environmental friendliness, one such niche player is the Chlorine Free Products Association. *See* CFPA, *at*

The rating firms in the table share some common characteristics that have a direct bearing on the need for regulation. For example, most rating firms operate in highly concentrated markets. Only restaurant reviewers face significant direct competition, and that is largely due to local market considerations, where each local newspaper and local travel guide typically offers restaurant reviews. When limited to nationally known reviewers, the restaurant ratings market is concentrated as well, with just a few raters. While around 18 product safety testing firms are currently in operation, Underwriter's Lab has around 50% to 60% of that market when measured by revenue.[159] In all other cases listed in the table, between 1 and 5 rating companies comprise the entire market.

A key conceptual challenge is explaining the size and number of firms in different ratings markets. A straightforward answer to this question is not readily apparent, and we think several factors may be important in determining ratings market structure. We offer some conjectures based on our empirical analysis as well as economic theory. On the supply side, some kinds of ratings may involve significant fixed costs, such as setting up an infrastructure to sample large, diverse populations. Media ratings, bond ratings, and environmental testing all fall into this category. More generally, some kinds of ratings may involve economies of scale or scope.[160] On the demand side, market size is likely to be a key determinant of the number of firms. The larger the number of items to rate and the larger the demand for ratings, the more the market can support multiple ratings firms. Most cities have only one zoo and one aquarium, and many cities have neither, which translates into limited demand for animal care rating services.

Another factor affecting the size distribution of rating firms in an industry is the need to economize on search costs by using rating firms with good reputations. If an individual is searching for a quality rating for a product, it may be easier to access *Consumer Reports* than to

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http://www.chlorinefreeproducts.org/about.htm (last visited Oct. 5, 2005). In the health care industry, a niche player is the Accreditation Association for Ambulatory Health Care. *See* AAAHC, *at* http://www.aaahc.org/eweb/StartPage.aspx (last visited Oct 5, 2005). In addition to niche players in health care accreditation, note that many of the health accreditation agencies do not accredit the same spectrum of health care organizations.

[159] Melissa Allison, *Underwriters Labs Puts Change to Test*, CHICAGO TRIBUNE, May 2, 2003, at 1.

[160] An example of scope would be product safety testing, where knowledge of one kind of product can inform testing standards for other kinds of products.

spend the time assessing the quality of different web sites that rate products of interest. As economist Herbert Simon once observed, a "wealth of information creates a poverty of attention."[161] Brand name ratings firms reduce information costs for buyers in making purchasing decisions. Of course, there may be significant fixed costs to acquiring and maintaining the brand, which would suggest fewer firms where branding was more important.

Other factors appear to be important as well in explaining the distribution of firms in the ratings industry. For instance, more subjective ratings, such as quality determinations in restaurants or business school ratings, leave more room for opinion, enabling raters to differentiate on the criteria they include or emphasize in their evaluations. On the other hand, the factors considered in rating baseball cards are well established and few in number—namely the condition of the edges and the surface and the centering of the printing.[162] This agreement leaves less room for differentiation and pushes toward market concentration.[163]

The need for a standard also appears to have a strong influence on market concentration. One reason for needing a standard is the presence of formal contracts that depend on ratings. When ratings form the basis for bilateral negotiations, as they do in television and radio ratings, a single standard measure may reduce transaction costs for firms.[164] Another reason for standard ratings is ease of comparison. Educational tests are standardized so that schools can compare students from diverse backgrounds. While there is considerable disagreement in how intelligence should be measured, strong competition in educational measures would defeat the purpose of testing in the first place.

The bottom line is that a number of factors appear to be important in explaining the distribution of rating firms in different industries. More detailed empirical work is needed to

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[161] *See* H. Varian, *supra* note 138, at 13.

[162] *See* Ginger Jin, Andrew Kato, & John List, That's News to Me! Information Revelation in Professional Certification Markets (Working Paper at U. Md, Jan. 2000.).

[163] In sports card ratings, new entrants differentiated on their grading, offering finer grade levels than the established players. Even here, there is only so much room for innovation, and hence there are only three significant players. Jin, Kato, & List, *supra* note 162.

[164] Of course, the standard measure will need to be of reasonable quality, which is another reason that the rating firm's reputation is important.

assess the relative importance of the many relevant factors, but we suspect that agreement on what needs to be measured and the need for a standard are two of the more important ones.

Another interesting theme that emerges from the examples in Table 1 is the infrequency of government regulation. As explained above, the Securities and Exchange Commission currently controls financial ratings firm entry by requiring any new firm to obtain recognized status prior to starting operations.[165] Similarly, in the product safety arena, the Occupational Safety and Health Administration sets the standards that private companies must use in testing electrical safety in the workplace;[166] and the Environmental Protection Agency licenses testers certifying the environmental friendliness of a product. Aside from entry into these specific areas, however, little government regulation is imposed on ratings firms. Moreover, even in finance, work-place safety, and environmental testing, the exact evaluation and rating method is generally left to the raters; most testing procedures are not regulated. In a few instances, such as automobile crash tests, the government does set a standard. Private ratings firms, however, are free to develop their own tests, as *Consumer Reports* does in assessing car safety.[167] Even voluntary oversight appears relatively rare, prevalent primarily among media raters.

A closer look at a few of these raters can offer further insights on the question of when and how to regulate rating companies. Here we provide two brief reviews of industries where ratings are prevalent: education and consumer goods. These examples, in conjunction with the media and bond ratings analyses already presented, illustrate the factors that set ratings firms apart from other kinds of businesses. We first consider product safety testing. Underwriters Laboratory, the company that certifies whether products meet minimum safety standards, dominates this industry. The second example is college entrance testing. Here, the industry

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[165] *See infra* Section III.

[166] The program is called the Nationally Recognized Testing Laboratory, and is part of OSHA's Directorate of Science, Technology, and Medicine. *See* DSTM/OTPCA: Nationally Recognized Testing Laboratory, *at* http://www.osha.gov/dts/otpca/nrtl/ (last visited Sept. 29, 2005).

[167] The private sector has an advantage over the government in that it has a positive incentive to respond to changes in the marketplace that could yield increased profits. This does not mean that the private ratings will necessarily be superior to those implemented by a government agency, however. For example, some point to the government regulation of food labels as a big success. See Marian Neuhouser, Alan Kristal & Ruth Patterson, *Use of Food Nutrition Labels is Associated with Lower Fat Intake*, 99 J. OF THE AM. DIETETIC ASSOCIATION 45, 45-53 (1999). Nonetheless, in situations where the marketplace is changing at a rapid pace, the onus should be on those supporting government intervention to suggest why it is likely to do more good than harm.

leader is Educational Testing Services (ETS), which provides a standard measure for evaluating college applicants.

B. Product Safety Testing

The product safety testing industry is dominated by Underwriters Laboratories. Founded in 1894 by electrician William H. Merrill and officially incorporated in 1901, Underwriters Laboratories has operated for over one hundred years as a privately held product safety testing and certification company.[168] Like other ratings companies, UL provides an independent, standardized, third-party assessment for the quality of products.[169] In the mid 1890s, insurance companies were having difficulty determining the fire risks associated with newly burgeoning electrical appliances. UL emerged to provide an independent test-based assessment of those hazards, later expanding to test and certify over 19,000 types of products.[170] Approval is sometimes conditioned on a manufacturer issuing warning labels, use-and-care booklets, and other safety information for consumers.[171] UL has no vested interest in any of the products it certifies, and thus provides an impartial assessment. As one article notes, "With contracts representing billions of dollars at stake there is no room for prejudice and no room for superficial judgment."[172]

Obtaining UL or any other tester's certification is largely voluntary. The rating company's testing procedures and standards are not regulated in any way. For certain narrow products like workplace electrical products, private testing companies must follow government established testing standards, but ratings firms could also decide not to test those particular products. Companies choose to submit their products for testing, and pay directly for that testing. They do so to enhance the sales of their products—the UL label is often sought out by

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[168] *See* Underwriters Laboratories, Inc, *at* http://www.ul.com (last visited Sept. 29, 2005). *See also*, Harry Chase Brearly, *A Symbol of Safety: The Origins of Underwriters' Laboratories*, in REPUTATION: STUDIES IN THE VOLUNTARY ELICITATION OF GOOD CONDUCT (Daniel B. Klein, ed., 1997).

[169] In another respect, UL is analogous to the MRC in that it provides a certification service, the UL label, which is paid for by manufacturers.

[170] *See* UL, *About UL*, *at* http://www.ul.com/about/ (last visited Sep. 29, 2005).

[171] Noel Campbell, *Replace FDA Regulation of Medical Devices with Third-Party Certification* (Cato Policy Analysis No. 288, 1997).

distributors, retailers, and consumers[173]—and to help reduce exposure to product liability lawsuits.[174]

For many years UL operated as the sole private sector product safety tester in the United States. Starting in the 1980s, as the number of electrical products seeking testing grew and as demand for certification among consumers increased, competitors to Underwriters Lab entered the testing market. Today, Intertek Testing Services, N.A. (ITSNA), formerly known as Electronics Testing Laboratories (ETL), and Met Electrical Testing (MET) both have made significant inroads into the market.[175] Nonetheless, UL still holds a revenue share of between 50% and 60%.[176]

Government regulations appear to have contributed to UL's continued prominence. At least 2,700 municipal, city, and state governments within the United States mandate safety certifications on certain products either sold or installed within their jurisdictions.[177] These governments typically only accept "recognized" certifiers, and some even mentioned UL by name. The situation is reminiscent of bond ratings. Corporations wishing to issue bonds want to ensure that those bonds are available to the widest possible audience of buyers. They, thus, seek bond ratings from ratings firms approved by the SEC so that national banks can bid on their bonds. Likewise, manufacturing companies seek product testing certifications from recognized raters so their products are available to the widest set of jurisdictions. As a result, approval rules in product safety testing raise barriers to entry and have likely contributed to UL's market dominance, just as they have limited entry in bond ratings.

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[172] Harry Chase Brearly, *A Symbol of Safety: The Origins of Underwriters' Laboratories*, in REPUTATION: STUDIES IN THE VOLUNTARY ELICITATION OF GOOD CONDUCT 78 (Daniel B. Klein, ed., 1997).

[173] *See* Steven P. Galante, *Small Labs Chip Away at UL in Market for Product Testing*, WALL ST. J., Nov. 10, 1986.

[174] Brearly, *supra* note 172.

[175] While public information on relative shares in the product safety testing market is not available, in 2004 Intertek Testing Services, N.A. reported a little over 40,000 certified products and MET Laboratories reported tens of thousands of certified products; according to company correspondence. However, such numbers are still far from Underwriters Laboratories' count of 19 billion UL certified products on the market in 2004. *See* Intertek Testing Services, N.A., *at* http://www.intertek.com/etlsemko?a=5441 (last visited Nov. 14, 2005); Underwriters Laboratories, *at* http://www.ul.com/about/index.html (last visited Nov. 14, 2005).

[176] Allison, *supra* note 159.

[177] Galante, *supra* note 173.

Some scholars claim that the product safety certification's process residing in the private sector enhances its value. To illustrate why, one scholar compares UL and similar organizations with the government-run Federal Aviation Administration.[178] The FAA does not have enough personnel to inspect all pilots and airlines—a common complaint among government regulatory agencies. Instead, the FAA relies on the airlines themselves to report whether they are meeting the agency's regulatory guidelines. Moreover, even when airlines are not in compliance, the FAA often allows them to continue operations—as it did with Aloha Airlines in 1988, ValueJet in the mid 1990s,[179] and Alaska Airlines in 2000. Underwriters Lab, on the other hand, conducts all its own testing and handles all of the factory inspections with its own engineers. It does not trust manufacturer representations of quality. If companies do not meet the relevant UL standards, those companies do not receive certification. Labels can even be revoked if quality deteriorates over time. One scholar notes that "a private sector firm …looks more closely at the firms it regulates than the FAA looks at aircraft and pilots."[180]

Product safety evaluation companies, nonetheless, do confront standard issues in assessing quality. Similar to media ratings companies, they must decide on appropriate approaches for testing. Just as no sample is ever a perfect reflection of the underlying census of people, no product is ever perfectly safe. One article observes, "UL official Drengenberg noted that 'It would be very easy for us to come up with an overly strict standard,' but then no one could afford to buy the product."[181] Or, even if they could afford it, they would not want it. For example, UL once built a completely fireproof office for several of its employees.[182] The room had ceramic tiles on the walls and ceiling, a thick concrete floor, and metal furniture. It was quite expensive to build, and quite uncomfortable to use.

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[178] *See* Randall G. Holcombe, *Eliminating Scope of Practice and Licensing Laws to Improve Health Care*, 31 AM. SOC'Y OF L., MED. & ETHICS (2003), at 5.

[179] In fact, it took the 1996 Florida Everglades crash to force the FAA into shutting down ValueJet. *See* Holcombe, *supra* note 173, at 6.

[180] Holcombe, *supra* note 173, at 5.

[181] Mark Thornton, *The Market for Safety*, Ludwig von Mises Institute Free Market Newsletter, *available at* http://www.westga.edu/~bquest/1996/uwlab.html (last visited Sept. 29, 2005).

[182] Thornton, *supra* note 181.

Instead of absolute standards, then, the safety ratings companies strive for realistic standards that balance safety with cost and usability. Companies are free to exceed UL's or other testers' standards, and according to time-tested economic theory, they will do so if consumers will pay for the resulting higher quality product.[183] This kind of balance is an issue in a number of ratings settings. Because people may differ on how to strike this balance in setting standards, interested parties may contest them in the political arena. The need for balance, however, should not be confused with a need for regulation.

C. Educational Measurement

While a number of firms provide student measurement services for various educational levels, only a few provide college entrance exams. Educational Testing Services (ETS) and American College Test (ACT) design and administer tests as a means of evaluating a person's aptitude and achievement levels for use in college entrance or employment decisions.[184] For example, ETS designs and administers entrance exams for college and graduate school, along with teacher certification tests and tests for English as a foreign language. While high school grades and other observable indicators of performance can be very informative, these indices vary widely from school to school and region to region. Educators wanted a standardized means of comparing students so that they could make better-informed admissions decisions. National exams administered by third parties provide that standardization. The measurement firms do not determine what a passing grade is for these tests. The thresholds are usually established by the colleges and universities or the state agencies that use the tests.[185]

Educational Testing Services is the dominant provider for a number of individual aptitude tests. ETS is a private, nonprofit organization established shortly after World War II by James Bryant Conant.[186] The organization's best-known product is the Scholastic Aptitude

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[183] KATZ & ROSEN, *supra* note 53, at 10-17.

[184] Some states like Texas offer additional college admissions tests. The Texas Higher Education Assessment test, for example, is required for those students who wish to enter a Texas public college or university. It is designed to assess the readiness of high school graduates entering college level classes. *See* THEA, *Program Overview*, http://www.thea.nesinc.com/index.asp (last visited Oct. 3, 2005).

[185] ETS, *Frequently Asked Questions About ETS*, *at* http://www.ets.org/faq.html (last visited Sept. 29, 2005).

[186] For more on ETS, *see* ETS home, *at* http://www.ets.org (last visited Sept 29, 2005).

Test—the SAT.[187] About three-fourths of U.S. high school students who wish to go to college take the SAT. Of the 1.8 million high school seniors that entered college in the fall of 2004, roughly 1.4 million took the SAT.[188]

As with the other evaluation industries examined thus far, little competition exists in educational testing. For college entrance exams, the American College Test (ACT) is the SAT's primary competitor, but fewer students take the ACT. Just as with media ratings, industry concentration has led to some claims that ETS holds an illegal monopoly.[189] By U.S. law, holding a monopoly is not illegal per se; gaining that monopoly by illegal means or abusing monopoly power is.[190] These finer points can sometimes be lost in political debates over regulation, where the mere mention of a monopoly can be enough to rally support against a firm. Regardless of ETS's monopoly status, however, not everyone appears to view their services as indispensable. California, Texas, and Florida are all considering dropping the SAT as a requirement for state college applications.[191] Thus, even when few direct rivals exist for a rater, demand-side responsiveness can provide market pressure.

ETS has faced another challenge reminiscent of the present media ratings controversy as well. In particular, the SAT has been challenged as "both culturally and statistically biased against African Americans, Hispanic Americans, and Asian Americans."[192] One of the proponents of this view, however, notes that ETS is already doing what it can to address what is a fundamental problem with all standardized testing:

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[187] Note that ETS did not create the SAT. The test was invented by Carl Brigham in 1926 while he was a professor at Princeton University. He based it on an intelligence test administered to American soldiers during World War I. ETS was, however, instrumental in the widespread adoption of the SAT among colleges. Alice Gromstyn, *The SATs: Admissions Test for Life?*, THE DARTMOUTH, May 16, 2000.

[188] The Bureau of Labor Statistics, *College enrollment of 2004 high school grads*, http://stat.bls.gov/opub/ted/2005/mar/wk4/art02.htm (Originally published Mar. 29, 2005); The College Board, *at* http://www.collegeboard.com/press/article/0,,46851,00.html (last visited Sept. 30, 2005).

[189] *See, e.g.*, the lawsuits described in National School Boards Association, *Teaching candidates sue testing company over mistakenly issued failing grades on licensing exam that cost them their positions*, LEGAL CLIPS. August 2004, *at* http://notes.nassmc.org/NBSfile04.nsf/0/f26ab2e64a7a5b1985256eeb0065227b?OpenDocument.

[190] FTC, MAINTAINING OR CREATING A MONOPOLY, *at* http://www.ftc.gov/bc/compguide/maintain.htm (last visited Sept. 29, 2005).

[191] Roy O. Freedle, *Correcting the SAT's ethnic and social-class bias: A method for reestimating SAT scores*, 73 HARV. EDUC. REV. 1, 44 (2003).

> For many years, before each new test is compiled, a strong and in many ways admirable effort has been made by ETS and the College Board to help identify individual items that produce very large ethnic differences…[but] one cannot fully erase the pervasive influence of cultural linguistic background…[193]

Just as question wording is entwined with "cultural linguistic background," certain sampling issues for media ratings measurement appear entwined with ethnic and racial factors. For example, younger and larger households generally have more television sets and thus have a higher incidence of dropping out of the ratings sample due to meter equipment problems. The younger and larger households also happen to be more prevalent among African Americans and Hispanics.[194] The two factors are thus confounded. The important point, for either media ratings or aptitude testing, is that statistics can be misleading. It is important to understand all of the factors underlying the data before drawing any conclusions.

Despite the controversy over educational testing, and the stakes involved, this ratings industry is not regulated. Intermediaries like educational testing firms provide a service that is valuable only so long as it is useful. It is yet another example of a concentrated ratings market that appears to be well functioning, albeit with the inevitable conflicts between consumers and suppliers.

V. CONCLUSION

This paper has provided a framework for analyzing the regulation of ratings firms. We began with three questions: first, is there a market failure?; second, is there a reasonable plan to address the alleged failure?; and third, are the benefits of the proposed policy likely to justify the costs? We used two recent debates, one centered on regulating media ratings and another on revising regulations for credit and bond raters, as our primary case studies for evaluating the regulation of ratings firms. While the proposed plan for intervening in the media ratings market

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[192] *Id*. at 1.

[193] *Id*. at 13.

[194] *See* Nielsen Media Research, *Press Release: Nielsen Reports Declines in Fault Rates*, (June 16, 2005), *available at* http://www.nielsenmedia.com/newsreleases/2005/Fault%20Rates%20Down%206-16-05.pdf; Reply from *Nielsen Media Research* to Post-Hearing Questions for the Record Submitted by Senator Lautenberg, *available at* http://www.everyonecounts.tv/news/0831_posthearing.htm (last visited Oct 2, 2005); *See also*, John

appears workable in theory, we find that it is unlikely to make economic sense because there is no clear evidence of a market failure and because the probable costs of the regulation would outweigh the probable benefits. In credit and bond ratings, the market failure is clear, but previous solutions have exacerbated some problems and resulted in government failures. The proposed legislative solution for bond ratings may not go far enough, but would at least be a step in the right direction.

We then considered the regulation of other kinds of rating industries. As a start, we characterized the economic and regulatory environment in which rating firms operate. One finding was that many private ratings industries are highly concentrated. Some factors that could increase concentration in ratings industries include economies of scale, reductions in transaction costs by having a single standard, and marketplace agreement on what should be measured. A second finding was that relatively few of the industries we reviewed are subject to government regulation. In some industries, especially in finance, the government restricts entry. Furthermore, self-governing oversight bodies are relatively rare, found primarily in television and radio, along with advisory ratings for movies and video games. Finally, most rating firms determine their own testing standards and methods.

We next examined two other ratings industries in detail: product safety testing and educational achievement measurement. In general, we found little evidence of direct government regulation in either of these two ratings industries. While the government sets the standards that private companies must use in testing electrical safety in the workplace, private safety testers such as UL set the evaluation criteria for the vast majority of the products they test. At the same time, regulations specifying the product safety ratings that government agencies can accept appear to have contributed to market concentration among raters. This is the case with credit and bond ratings as well as product safety testing.

Even though we find that government regulation of ratings firms is not likely to be socially beneficial in many settings, we still maintain that there is an important role for government in setting some kinds of standards. Based on the framework applied in this paper,

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Maynard, *TV Stations Worry 'People Meters' Miss Minorities; Nielsen Asked to Delay New System*, WASHINGTON POST, May 26, 2005, at C01.

regulation is required in cases where there are clear market failures that private ratings firms may not adequately address. For example, in markets with serious externalities or coordination problems and pollution-creating manufacturing, government intervention in the provision of ratings can be justified. Moreover, the standard antitrust laws should apply to ratings firms just as they do for other firms in the economy. Market concentration may be the norm among raters, but potential abuses of market power should be monitored closely.

The fact that our analysis reveals certain similarities across different ratings industries raises a number of important research issues. First, empirical research aimed at better understanding the reasons behind market concentration is needed. Second, it would be useful to know when industry oversight bodies could improve on rating services provided to consumers and producers by private firms. That is, could other industries besides media ratings benefit from groups like the MRC? Third, it is worth identifying situations where the private sector as opposed to the government is in a better position to set measurement criteria.[195] Currently, the government rates airline safety and meat quality, to name two examples. Would those tasks, and others, be better handled by the private sector? In the end, we think that there are not always simple answers to which institution should design a measurement standard, but guidelines might emerge, which makes the question worth asking. Finally, a more refined economic theory of the structure of ratings could inform empirical work, and possibly offer some insights into the optimal regulation of ratings firms.

[195] A full-blown treatment of this issue would consider a number of organizational forms within the private sector, not-for profit sector, and the government.

VI. APPENDIX TO TABLE 1

Industry	Sources
Media	• **Arbitron**, http://www.arbitron.com/home/content.stm (last visited Sept. 29, 2005). • **Entertainment Software Ratings Board**, http://www.esrb.org/ (last visited Sept. 29, 2005). • **Motion Picture Association of America**, http://www.mpaa.org/movieratings/about/index.htm (last visited Sept. 29, 2005). • **Nielsen Media Research**, http://www.nielsenmedia.com/ (last visited Sept. 29, 2005).
Healthcare	• **Community Health Accreditation Program**, http://www.chapinc.org/ (last visited Oct. 5, 2005). • **Department of Health and Human Services**, *Improving Health Care Quality: A Guide for Patients and Families*, (Oct. 2000), *at* http://www.ahrq.gov/consumer/qntlite/qntlite.htm (AHRQ Publication No. 01-0004). • Elaine Zablocki, ***Seal of Approval***, 15 MANAGED HEALTHCARE. June 1, 2005, at 30. • Frederick P. Franko, ***Health Policy Issues***, AORN J., June 2002, *at* http://www.aorn.org/journal/2002/junehpi.htm • **HealthGrades**, http://www.healthgrades.com/ (last visited Sept 29, 2005). • **HealthShare Technology**, http://www.healthshare.com/index.asp (last visited Sept. 29, 2005). • **Joint Commission on Accreditation of Healthcare Organizations**, http://www.jcaho.org (last visited Sept. 29, 2005). • **Leapfrog Group**, http://www.leapfroggroup.org/ (last visited Sept. 29, 2005). • **National Committee for Quality Assurance**, http://www.ncqa.org (last visited Sept. 29, 2005). • **URAC**, http://www.urac.org (last visited Sept. 29, 2005).

Finance	• **Consumer Reports**, http://www.consumerreports.org (last visited Oct. 28, 2005). • **Fitch Ratings**, http://fitchratings.com (last visited Sept. 29, 2005). • **Forbes**, http://www.forbes.com/funds/ (last visited October 28, 2005). • **Institutional Investor**, http://www.iinews.com/ (last visited Sept. 29, 2005). • Isabelle Lindenmayer, ***Innovis' Goal: Complete with Big 3 Credit Bureaus***, 170 AMERICAN BANKER, Sept. 2005, at 7. • **Lipper**, http://www.lipperweb.com/index.asp (last visited Oct. 28, 2005). • **Moodys**, http://www.moodys.com/cust/default.asp (last visited Sept. 29, 2005). • **Securities and Exchange Commission**, *Concept Release: Rating Agencies and the Use of Credit Ratings under the Federal Securities Laws*, *available at* http://www.sec.gov/rules/concept/33-8236.htm (last modified June 10, 2003). • **SHADOW FINANCIAL REGULATORY COMMITTEE**, AMERICAN ENTERPRISE INSTITUTE, SEC STANDARDS FOR DESIGNATING NATIONALLY RECOGNIZED CREDIT RATING ORGANIZATIONS, Dec. 9, 2002, *available at* http://www.aei.org/publications/pubID.25,filter.all/pub_detail.asp (last visited Sept. 29, 2005). • **Standard and Poor's**, http://www.standardandpoors.com/ (last visited Sept. 29, 2005). • Robert Reid, ***Learn About the Markets, Institutional Investor Rankings Matter***, BRIEFING.COM, http://www.briefing.com/GeneralInfo/Features/LearningCenter/edu_Institutional_Investor.htm (last visited Sept. 29, 2005). • **Morningstar**, http://www.morningstar.com/ (last visited Sept. 29, 2005). • **Value Line**, http://www.valueline.com/ (last visited Sept. 29, 2005). • **Weiss Ratings**, http://www.weissratings.com/ (last visited Oct. 28, 2005).

Education	• **American College Testing**, http://www.act.org (last visited Sept. 29, 2005). • **Barron's**, http://www.barronseduc.com/school-guides-undergraduate.html (last visited Sept. 29, 2005). • **CTB McGraw-Hill**, http://www.ctb.com/ (last visited Sept. 29, 2005). • **Educational Testing Service**, http://www.ets.org (last visited Sept. 29, 2005). • **Harcourt**, http://www.harcourt.com/ (last visited Sept. 29, 2005). • Karen DeMasters, ***ETS toils through a testing time***, BUS. NEWS N.J., Oct. 6, 1997, at 1. • **NCS Pearson**, http://www.ncspearson.com/ (last visited Sept. 29, 2005). • Paige Austin, Elizabeth Green, Avi Zenilman & Brian Beutler, ***The Washington Monthly College Guide***, WASHINGTON MONTHLY. (Sept. 2005), *available at* http://www.washingtonmonthly.com/features/2005/0509.collegeguide.html (last visited Sept. 29, 2005). • **PBS**, *The Testing Industry's Big Four, at* http://www.pbs.org/wgbh/pages/frontline/shows/schools/testing/companies.html (last visited on Sept. 29, 2005). • **Princeton Review**, *FAQ about The Best 361 Colleges and The Princeton Review College Rankings, at* http://www.princetonreview.com/college/research/articles/find/rankingsFAQ.asp (last visited Sept. 29, 2005). • **Riverside Publishing**, http://www.riverpub.com/ (last visited Sept. 29, 2005). • **U.S. News & World Report**, http://www.usnews.com/usnews/edu/eduhome.htm (last visited Sept. 29, 2005).

Consumer Goods	• **BITS Financial Services Security Labs**, http://bitsinfo.org/c_certification.html (Nov. 10, 2005). • **Consumer Reports**, http://www.consumerreports.org/ (Oct. 28, 2005). • **eBay**, *Graded Sports Cards Buying Guide*, http://pages.ebay.com/buy/guides/graded-sports-cards-buying-guide/ (last visited Sept. 29, 2005). • Ginger Jin, Andrew Kato, & John List, **That's News to Me! Information Revelation in Professional Certification Markets** (January 2000) (Working paper. • **Good Housekeeping**, *What's Behind the Good Housekeeping Seal?*, http://magazines.ivillage.com/goodhousekeeping/consumer/institute/articles/0,,284512_596441,00.html (last visited Sept 29, 2005). • Heather Williams, ***Crash tests for dummies: IIHS and NHTSA ratings explained***, INSURE.COM, http://info.insure.com/auto/collision/crashtestbasics.html (Sept. 29, 2005). • **ICSA Labs**, http://www.icsalabs.com/icsa/icsahome.php (last visited Nov. 10, 2005). • Melissa Allison, ***Underwriters Labs puts change to test***, CHICAGO TRIBUNE, May 5, 2003 at 1. • **National Highway Traffic Safety Administration**, Department of Transportation, *Other crash test sites*, http://www.nhtsa.dot.gov/cars/testing/ncap/pages/ResourcesLinksOCTS.htm (last visited Sept. 29, 2005). • **Occupational Safety and Health Administration**, U.S. Department of Labor, *Nationally Recognized Testing Laboratory (NTRL)*, http://www.osha.gov/dts/otpca/nrtl/ (page last updated Sept. 12, 2005). • Tara Baukus Mello, ***What Crash Test Scores Mean***, EDMUNDS.COM, *available at* http://www.edmunds.com/ownership/safety/articles/43804/article.html (last visited Sept. 29, 2005). • **Underwriters Laboratories**, http://www.ul.com/ (last visited Sept 29, 2005). • **Zagat Survey**, http://www.zagat.com/ (last visited Sept. 29, 2005).

Food/Travel	• **AAA**, http://www.aaa.com/ (last visited Sept. 29, 2005). • David Shaw, **Restaurants; Matter of Taste; What the French have that we don't**, L.A. TIMES. May 19, 2004, at F9. • Laura Daily, ***Making sense of hotel ratings***, VIA, Sept. 2004, *available at* http://www.viamagazine.com/top_stories/articles/Hotel_Ratings04.asp (last visited Sept. 29, 2005). • **Mobil Travel Guide**, http://www.mobiltravelguide.com/mtg/ (last visited Sept. 29, 2005).
Environment	• Errol E. Meidinger, ***Environmental Certification Programs and U.S. Environmental Law: Closer Than You May Think***, 31 ENVIRONMENTAL LAW REPORTER, 10162, 10162-10166, (2001) • **Forest Stewardship Council**, http://www.fscus.org/ (last visited Sept. 29, 2005). • **Green Seal**, *at* http://www.greenseal.org/ (last visited Sept. 29, 2005). *Product Testing: Energy Star*, http://www.energystar.gov/index.cfm?c=prod_development.prod_development_protect (last visited Sept. 29, 2005). • **Scientific Certification Systems**, http://www.scscertified.com/ (last visited Sept. 29, 2005). • **The American Zoo and Aquarium Association**, http://www.aza.org/ (last visited Sept. 29, 2005).